91-119

No. _____

Supreme Court, U.S.
FILED
JUL 19 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

Petition For a Writ of Certiorari
To The Supreme Court of Wisconsin

PETITION FOR A WRIT OF CERTIORARI

JAMES E. DOYLE
Attorney General of Wisconsin

F. THOMAS CREERON III
Assistant Attorney General
State of Wisconsin
Counsel of Record

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8549

Attorneys for Petitioner

LIBRARY
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WASHINGTON, D.C. 20543

QUESTION PRESENTED

In attempting to fairly apportion otherwise taxable income from sales of tangible personal property within their boundaries by foreign corporations, how are the "solicitation" and "delivery" requirements in Pub. L. No. 86-272 to be applied by state taxing authorities in the face of conflicting decisions from state courts of last resort as to whether those requirements admit of a *de minimis* exception and as to whether "solicitation" encompasses post-sale activities "incidental" to the canvassing of retail customers.

LIST OF PARTIES

The parties to this action are the Wisconsin Department of Revenue and the William Wrigley, Jr. Company.

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WISCONSIN DEPARTMENT OF REVENUE,

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WILLIAM WRIGLEY, JR. COMPANY,

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Petition For a Writ of Certiorari To The Supreme Court of Wisconsin

PETITION FOR A WRIT OF CERTIORARI

The State of Wisconsin respectfully requests that a writ of certiorari issue to review a final judgment of the Supreme Court of Wisconsin voiding six years of franchise tax assessments against the respondent.

OPINIONS BELOW

The decision from which review is sought is published and is reprinted in its entirety in the appendix (A-1).

William Wrigley, Jr. Co. v. Dept. of Rev., 160 Wis. 2d 53, 465 N.W.2d 800 (1991). The Wisconsin Tax Appeals Commission had earlier upheld Wisconsin's franchise tax assessment against Wrigley (A-218). *William Wrigley, Jr. Co. v. Wisconsin Department of Revenue*, Docket No. I-8591, Wis. Tax Rptr. [CCH] ¶202-792, 1986 Wisc. Tax LEXIS 4 (November 18, 1986). After a procedural remand (A-204), *William Wrigley, Jr. Co. v. Wisconsin Department of Revenue*, Dane County Circuit Court, Case Nos. 86-CV-6679 and 86-CV-6796, Wis. Tax Rptr. [CCH] ¶202-905 (August 20, 1987), the Commission reinstated its original decision (A-163). *William Wrigley, Jr. Co. v. Wisconsin Department of Revenue*, Docket No. I-8591, Wis. Tax Rptr. [CCH] ¶202-792, 1987 Wisc. Tax LEXIS 5 (November 25, 1987).

On appeal, the circuit court reversed the Commission's decision reinstating the assessment (A-78). *William Wrigley, Jr. Co. v. Wisconsin Department of Revenue*, Dane County Circuit Court, Case Nos. 87-CV-7468 and 87-CV-7478, Wis. Tax Rptr. [CCH] ¶203-000 (October 19,

1988). In a published decision, the Wisconsin Court of Appeals reversed the circuit court, finding that the Commission's decision had been correct (A-46). *William Wrigley, Jr. Co. v. Wis. Dept. of Rev.*, 153 Wis. 2d 559, 451 N.W.2d 444 (Wis. App. 1989). The Wisconsin Supreme Court, in turn, reversed the court of appeals' decision (A-1).

JURISDICTION

The judgment from which review is sought was issued on February 19, 1991 (A-1). Pursuant to S. Ct. R. 30.3, Justice Stevens issued an order granting petitioner an extension of time through July 19, 1991, in which to file a petition for a writ of certiorari. *Wisconsin Department of Revenue v. William Wrigley, Jr. Co.*, No. A-850 (May 13, 1991). The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 2101(c).

STATUTE INVOLVED

Pub. L. No. 86-272, codified at 15 U.S.C. § 381, provides, in relevant part:

> Minimum Standards
>
> (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the *only* business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:
>
> (1) the *solicitation of orders* by such person, or his representative, in such State for sales of tangible personal property, which orders are *sent outside the State for approval* or rejection, *and*, if approved, are *filled by shipment or delivery from a point outside the State*; and
>
> (2) the *solicitation of orders* by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

(Emphasis supplied.)

STATEMENT OF THE CASE

From its inception, the focal point of this case has been whether "[t]he ongoing business activities of the William Wrigley Jr. Company in the State of Wisconsin during the years 1973 through 1978 exceeded the 'solicitation of orders' protected by 15 U.S.C. [§] 381 (P.L. 86-272)." (A-243.) Each successive tribunal that has examined the merits of that issue has reached the opposite conclusion concerning that question (A-1; A-46; A-78; A-218).

During the years at issue, Wrigley had an extensive dollar volume of sales in Wisconsin:

1973 - $2,797,055	1976 - $4,025,372
1974 - $3,184,703	1977 - $4,091,568
1975 - $3,898,041	1978 - $4,392,202

(A-219). Using a three-factor apportionment formula (payroll, property, and sales) similar to those employed by all states that impose an income or franchise tax on multistate corporations, the following amounts of income

were determined to be apportionable to Wisconsin during those years (A-220):

1973 - $ 86,663	1976 - $379,475
1974 - $ 90,185	1977 - $342,429
1975 - $316,069	1978 - $443,374

Since Wrigley had filed returns only in its home state of Illinois and in the states where it had offices or manufacturing facilities, Wisconsin issued a franchise tax assessment on October 6, 1980 in the total amount of $246,641.04 for all six years, including substantial interest and penalties, some of which were later eliminated by the Commission (A-220, 222).

Wrigley manufactured chewing gum outside of Wisconsin and made sales through four or five sales representatives who lived and worked in Wisconsin, servicing both wholesale (direct) and retail (indirect) accounts (A-223). Wholesale orders were submitted to and shipped from Illinois (A-230).

Wrigley's sales representatives maintained substantial stocks of gum, carried on company books as inventory, sufficient to enable each of them to replace stale gum

located at all of their account locations (A-224-225). They also engaged in other post-sale activities including installation and maintenance of both regular retail product and promotional displays, checking inventory in such displays and advising retailers concerning their design and content (A-224-225). On the average of once per month when necessary to complete particular displays, they would issue "agency stock checks" in small dollar amounts instructing Wrigley to bill the retailer's wholesaler who would then bill the retailer (A-230). They would then furnish gum to retailers from their own individual supplies located in Wisconsin (A-230).

The sales territories in Wisconsin were located in the Milwaukee Region, which was run by a resident regional sales manager who was not assigned a retail territory (A-224). The resident regional manager prepared sales reports, trained and supervised each sales representative and was involved in personnel decisions including hiring, firing and salary recommendations (A-231). From 1973-1975, the regional manager maintained an office in

his home for which he claimed Wisconsin income tax deductions and where he held yearly training sessions (A-230-231). He also intervened in credit transactions a few times each year (A-232).

In 1973, when the regional manager terminated an employee, he rented and was reimbursed by Wrigley for the cost of warehouse space to store a company car, cases of gum and display materials; a similar arrangement continued for three years after a replacement was hired (A-67). Again in 1976, and through the end of the period at issue, that sales representative rented and was reimbursed by Wrigley for warehouse space because his display materials and stock of gum still would not fit in his apartment (A-225).

Other facts appear in the decision of the court of appeals, 451 N.W.2d at 450-51, and in the decision of the Wisconsin Supreme Court, 465 N.W.2d at 803-06.

The Wisconsin Tax Appeals Commission, using standards promulgated by the Multistate Tax Commission for guidance, held that the following activities were not

closely related to solicitation: 1) maintenance of a stock of gum and replacement of stale gum; 2) maintaining product displays with respect to location, design and content; 3) direct gum sales by means of agency stock checks; 4) maintenance of offices in the home by the resident regional managers; 5) conducting training sessions; 6) training, evaluating the performance of and recommending hiring, firing and compensation for sales representatives by the regional manager; 7) preparation of periodic sales analyses and reports by the regional manager; 8) involvement in credit transactions by the regional manager for tax years 1973-1975; 9) rental of storage space; and 10) non-incidental advertising (A-249-253).

The Dane County Circuit Court held that all of Wrigley's Wisconsin activities constituted "'lesser, included phases' which Congress intended to . . . protec[t]" (A-140) (citation omitted). It also viewed infrequent exceptions to Wrigley's usual practices "[a]s *de minimis*" (A-142). It

therefore reversed the Commission's decision upholding the assessment (A-143).

The Wisconsin Court of Appeals defined the term "solicitation" as "those generally accepted or customary acts in the industry which lead to the placing of orders." *Wrigley*, 451 N.W.2d at 448. It therefore determined that "solicitation" "should not include those acts which follow as a natural result of the transaction." *Wrigley*, 451 N.W.2d at 449. Employing this standard, it held that Wrigley was not entitled to claim the protection offered by the statute: "Wrigley's Wisconsin employees were not just 'missionaries.' They were hirers, firers, meeting organizers, trainers, customer credit 'intervenors' or 'mediators,' renters of warehouse space, stale product replacers, inventory-carriers, display stockers, sellers and billers." *Wrigley*, 451 N.W.2d at 452. It then reinstated the assessment overturned by the circuit court.

Reversing, the Wisconsin Supreme Court held that solicitation "includes activities incidental to the initial contact between buyer and seller" even when "th[e] orders

may be future orders." *Wrigley*, 465 N.W.2d at 809, 811. It determined that factors to be considered in employing this standard include whether the company maintains a warehouse or a stock of goods within the state, the type of business involved, the manner in which orders are solicited and the way products are sold. *Wrigley*, 465 N.W.2d at 812. It also found that, in applying these factors, deviations from the norm may be considered *de minimis*. *Wrigley*, 465 N.W.2d at 812. That court therefore held that federal law precluded Wisconsin from assessing any franchise tax whatsoever for the six-year period at issue. *Wrigley*, 465 N.W.2d at 812.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE WISCONSIN SUPREME COURT IS INCONSISTENT WITH DECISIONS OF THIS COURT ARTICULATING PRINCIPLES OF STATUTORY CONSTRUCTION CONCERNING STATUTES INVOLVING FEDERAL-STATE RELATIONS BOTH IN GENERAL AND WITH REFERENCE TO THE PARTICULAR STATUTE AT ISSUE IN THIS CASE.

A. In exercising its powers under the Commerce Clause, Congress is presumed not to have significantly altered the preexisting authority of the states unless it uses unmistakable language to do so.

When acting under the Commerce Clause, Congress may override the states' preexisting powers or sovereign authority, but it must "do[] so clearly." *Cf. Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273, 2281 (1989). Where Congressional preemption of state regulatory activity is less than clear, it will not be implied by this Court. *See generally, Bowen v. American Hosp. Ass'n.*, 476 U.S. 610, 643 n.33 (1986).

These principles of statutory construction have already been applied by the Court to Pub. L. No. 86-272: "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance." *Heublein, Inc. v. South Carolina Tax Commission*, 409 U.S. 275, 282-83 (1972), *quoting United States v. Bass*, 404 U.S. 336, 349 (1971).

The Wisconsin Supreme Court's construction of the term "solicitation" should be tested against this canon of statutory construction.

B. The Wisconsin Supreme Court's broad construction of the term "solicitation" is not supported by unmistakably clear language in the text of the statute.

Presumptively all of the income of a single corporation is apportionable. *See Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 219 (1980). Although due process limits a state's ability to apportion the income of a foreign corporation, due process requires only that there be 1) a "minimal connection" or nexus between the interstate activities and the taxing state, and 2) a "rational relationship" between income attributed to the state and the intrastate values of the enterprise. *Trinova Corp. v. Michigan Dept. of Treasury*, ___ U.S. ___, 111 S. Ct. 818, 828 (1991). A "wide range of benefits" including the "advantages of a civilized society" satisfy the requirement that the tax fairly relate to benefits the state provides.

Goldberg v. Sweet, 488 U.S. 252, 257 (1989). "The simple but controlling question is whether the state has given anything for which it can ask return." *State of Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940).

In *N.W. States Portland Cement Co. v. State of Minn.*, 358 U.S. 450, 454 (1959), the Court held that due process permits the imposition of a fairly apportioned tax where a foreign corporation engages in "a regular and systematic course of solicitation of orders for the sale of its products." In *Heublein*, 409 U.S. at 279–280, this Court then said:

> The impetus behind the enactment of § 381 was this Court's opinion in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 3 L.Ed.2d 421, 79 S. Ct. 357, 67 A.L.R.2d 1292 (1959). There we held that "net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same." 359 U.S., at 452, 3 L.Ed.2d 421. Congress promptly responded to the "considerable concern and uncertainty" and the "serious apprehension in the commercial community" generated by this decision by enacting Pub. L. No. 86-272, 73 Stat. 555, 15 U.S.C. § 381 [15 U.S.C.S. § 381] within seven months.

> In this statute, Congress attempted to allay the apprehension of businessmen that "*mere solicitation*" would subject them to state taxation. Such apprehension arose because, as businessmen who sought relief from Congress viewed the situation, Northwestern States Portland Cement did not adequately specify what local activities were enough to create a "sufficient nexus" for the exercise of the State's power to tax. Section 381 was designed *to define clearly a lower limit for the exercise of that power. Clarity which would remove uncertainty was Congress' primary goal.*

(Footnotes omitted; emphasis supplied.)

Although *Portland Cement* may have created the initial impetus for legislative action, Congress was also reacting to two later cases in which the Court refused to grant certiorari. In each instance, a state court decision had extended the reasoning in *Portland Cement* so as to permit the imposition of state income tax on out-of-state corporations even though those corporations only employed non-resident "drummers" or "missionary men" and did not maintain any physical facilities within the taxing state. *Brown-Forman Distillers Corp. v. Collector of Revenue*, 234 La. 651, 101 So. 2d 70 (1958), *cert. denied*, 359 U.S. 28 (1959); *International Shoe Co. v. Fontenot*, 236 La. 279, 107

So. 2d 640 (1958), *cert. denied*, 359 U.S. 984 (1959). It is "generally believed" that Pub. L. No. 86-272 did not overrule *Portland Cement*, but did alter the rule stated in *Fontenot*. Tatarowicz, *State Judicial and Administrative Interpretations of U.S. Public Law 86-272*, 38 Tax Lawyer 294, 302 (1985).

The Wisconsin Supreme Court's construction of the statute alters the preexisting powers of the states to a degree not supported by clearly expressed textual language. Even after the passage of the statute, apportionment remained the general rule, with "solicitation" constituting a new, but limited exception. Since the statute alters the preexisting authority of the states to fairly apportion income derived from sales by foreign corporations within their boundaries, any ambiguity in its terms is subject to the narrowest construction that produces predictability.

The central theme that permeates the Wisconsin Supreme Court's decision is that immunity is the rule and taxation the exception. That statutory construct is

inconsistent with the principles of federalism articulated by the Court in *Heublein* and therefore should not be allowed to stand.

The Wisconsin Supreme Court's post-sale "incidental activity" gloss on the term "solicitation" also results in a lack of predictability and is therefore contrary to the Congressional goals of clarity and certainty identified by the Court in *Heublein*. In fact, the Wisconsin Supreme Court acknowledged that the court of appeals' "pre-sale/post-sale test may produce consistency and predictability[.]" *Wrigley*, 465 N.W.2d at 809. Yet, it held that any activity whose purpose is "encouraging future orders" constitutes "solicitation." *Id.* The fundamental problem with such a standard is that it could be applied to immunize virtually any activity conducted by a foreign corporation that is exclusively engaged in the business of selling tangible personal property in retail establishments. That standard is therefore entirely at odds with the principal goal surrounding the enactment of Pub. L.

No. 86-272 and repugnant to this Court's analysis of the statute in *Heublein*.

C. When federal statutory terminology is unambiguous, it must be enforced by the courts.

Unless exceptional circumstances are present, judicial inquiry is complete when particular terms in a statute are found to be unambiguous. *Demarest v. Manspeaker*, ___ U.S. ___, 111 S. Ct. 599, 604 (1991). In those situations, inquiry into legislative history becomes "irrelevant." *Burlington Northern R. Co. v. Oklahoma Tax Com'n*, 481 U.S. 454, 461 (1987). In those situations, a court's sole obligation is to enforce the unambiguous statutory terminology. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 109 S. Ct. 1026, 1030 (1989).

In sum, to the extent that a federal statute contains unambiguous terms, a state court's sole obligation is to enforce them.

D. The Wisconsin Supreme Court failed to enforce the unambiguous term "only" in Pub. L. No. 86-272.

The agency stock check procedure periodically employed by Wrigley involved delivery to a retailer from a stock of goods within the state. And Wrigley's rental of warehouse space is hardly a commonly understood form of "solicitation." In order to hurdle these and other problems surrounding Wrigley's actual conduct in this case, the Wisconsin Supreme Court effectively held that compliance with the statute is excused unless *non*compliance is "of sufficient weight in the flow on interstate commerce." *Wrigley*, 465 N.W.2d at 811.

Not only does that holding excise the word "only" from the statute, it also inverts its entire premise. The statute *permits* taxation unless the taxpayer's "only" activities involve a specified manner of "solicitation" and "delivery." The Wisconsin Supreme Court's holding *prohibits* taxation unless the taxpayer engages in a requisite, but entirely unspecified, quantum of those two activities. Such a *de minimis* standard hardly promotes clarity or removes

uncertainty, since its bounds can never be ascertained in advance by either the taxpayer or the state taxing authority.

The *de minimis* concept is also utterly inconsistent with due process apportionment principles. For due process purposes, an isolated incursion into a state by a foreign corporation may not be sufficient to create nexus sufficient to justify the imposition of a fairly apportioned tax. But systematic exploitation of a domestic market by such a corporation is precisely the kind of activity that warrants the imposition of that kind of tax. A *de minimis* concept, however, permits a foreign corporation to measure any claimed violation of the requirements of the statute against its success in exploiting the domestic market. The *greater* that success, which would normally justify the imposition of a fairly apportioned tax, the *more* tenable a *de minimis* claim will be.

Further review is warranted because the Wisconsin Supreme Court's construction of Pub. L. No. 86-272 is inconsistent with both decisions of this Court employing

canons of statutory construction applicable to federal statutes involving federal-state relations and with traditional due process apportionment principles.

II. THE DECISION OF THE WISCONSIN SUPREME COURT IS INCONSISTENT WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT CONSTRUING THE REQUIREMENTS OF PUB. L. NO. 86-272.

A. State courts have employed three different constructions of the term "solicitation."

The Wisconsin Supreme Court held that the statute immunizes "activities in Wisconsin . . . incidental to the solicitation of orders." *Wrigley*, 465 N.W.2d at 811.

The term "solicitation" in Pub. L. No. 86-272 has been "a definitional quagmire." P. Hartman, *Federal Limitations on State and Local Taxation* § 9:11, at 390 (Supp. 1990). The Georgia Supreme Court has described the three definitions of "solicitation" developed by the state courts in the following fashion:

> [C]ourts have adopted one of three successively more inclusive definitions of "solicitation": (1) the specific act of asking a customer to purchase one's

> product . . . [1]; (2) any act which *leads to* the purchase of one's product as opposed to acts which *follow from* the purchase [2] . . . ; and (3) any act which *leads to* or *follows from* the purchase so long as said act is *incidental* to the purchase . . . [3].

Chattanooga Glass Co. v. Strickland, 244 Ga. 603, 261 S.E.2d 599, 600-601 (1979) (emphasis supplied; citations

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[1]Decisions of state courts of last resort perceived to have employed the narrowest of the three definitions include *Hervey v. AMF Beaird, Inc.*, 250 Ark. 147, 464 S.W.2d 557 (1971) and *Clairol, Incorporated v. Kingsley*, 109 N.J. Super. 22, 262 A.2d 213, *aff'd*, 57 N.J. 199, 270 A.2d 702 (1970), *appeal dismissed*, 402 U.S. 902 (1972).

[2]Decisions of state courts of last resort perceived to have employed definitions no broader than this intermediate standard include *Drackett Products Co. v. Conrad*, 370 N.W.2d 723 (N.D. 1985); *Sjong v. State, Dept. of Revenue*, 622 P.2d 967 (Alaska 1981), *appeal dismissed*, 454 U.S. 1131 (1982); *Jantzen, Inc. v. District of Columbia*, 395 A.2d 29 (D.C. 1978); *Miles Laboratories, Inc. v. Department of Revenue*, 274 Or. 395, 546 P.2d 1081 (1976); and *Chattanooga Glass* itself.

[3]Decisions of state courts of last resort perceived to have adopted the broadest of these three standards include *Ind. Dept. of Revenue v. Kimberly-Clark Corp.*, 275 Ind. 378, 416 N.E.2d 1264 (1981); *Deseret Pharm. Co., Inc. v. State Tax Comm.*, 579 P.2d 1322 (Utah 1978); *U.S. Tobacco Co. v. Com.*, 478 Pa. 125, 386 A.2d 471, *cert. denied*, 439 U.S. 880 (1978); *Gillette Company v. State Tax Commission*, 56 A.D.2d 475, 393 N.Y.S.2d 186 (1977), *aff'd*, 410 N.Y.S.2d 65, 382 N.E.2d 764 (1978); *Coors Porcelain Company v. State*, 183 Colo. 325, 517 P.2d 838 (1973), *cert. denied*, 419 U.S. 874 (1974); *State v. State Tax Commission*, 382 S.W.2d 645 (Mo. 1964); and *Smith Kline & French Laboratories v. State Tax Com'n*, 241 Or. 50, 403 P.2d 375 (1965) (since repudiated).

omitted). *Accord*: *Wrigley*, 451 N.W.2d at 448; *Ringgold Coal Mining Company v. Taxation Division Director*, 4 N.J. Tax 321 (April 29, 1982).

Articles and treatises examining these three lines of authority have criticized the expansive post-sale "incidental" solicitation[4] standard both as being inconsistent with the statutory text and as resulting in uncertainty and administrative complexity. Note, *Public Law 86-272: Legislative Ambiguities and Judicial Difficulties*, 27 Vand. L. Rev. 313, 340 (1974). They have also noted that an overly-broad definition of "solicitation" may result in competitive disadvantage to intrastate domestic businesses. *Federal Limitations* § 9:14, at

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[4]In delineating those activities encompassed by the term "solicitation," the Wisconsin Supreme Court also held that an appropriate reference point is "the type of business involved[.]" *Wrigley*, 465 N.W.2d at 812. While no state court of last resort has directly addressed the implication that promulgation of specific business customs within a particular industry dictates whether immunity from taxation must be granted, the Oregon Tax Court has recognized that "many businesses, by their very nature, cannot claim the benefits of the federal statute." *Olympia Brewing Co. v. Department of Revenue*, 5 Or. T.R. 99, 110 (1972), *aff'd*, 266 Or. 309, 511 P.2d 837 (1973), *cert. denied*, 415 U.S. 976 (1974).

517–18. The policy reasons identified by these commentators also indicate that an overly–broad "solicitation" standard was adopted by the Wisconsin Supreme Court.

B. State courts have both accepted and rejected the premise that the statute admits of a *de minimis* exception.

The Wisconsin Supreme Court also held that, when applying the "solicitation" and "delivery" requirements of Pub. L. No. 86–272, immunity may still be claimed from a fairly apportioned tax, so long as there are only "*de minimis* deviation[s] from the usual practice" of limiting in–state activities to canvassing potential customers and forwarding orders for acceptance and approval outside the state. *Wrigley*, 465 N.W.2d at 812. It determined that any violation of the literal language of the statute is *de minimis* unless that particular activity involves a significant contribution to the flow of interstate commerce. *Wrigley*, 465 N.W.2d at 811.

A number of the courts that have expansively defined "solicitation" have indicated that the statute admits of a *de minimis* exception. *See e.g., Coors Porcelain*, 517 P.2d at 843; *Kimberly–Clark*, 416 N.E.2d at 1268. *Also see, John Ownbey Co. v. Butler*, 211 Tenn. 336, 365 S.W.2d 33, 39 (1963). But other state courts of last resort have indicated that "it is not the quantity of activity that determines whether the federal statute is a shield against state income tax liability." *Amway Corp., Inc. v. Director of Revenue*, 794 S.W.2d 666, 670 (Mo. Banc. 1990). *U.S. Tobacco*, 386 A.2d at 477, one of the principal cases relied upon by the Wisconsin Supreme Court in other respects, also indicates that whatever "standard is employed, any nexus with the taxing state that cannot accurately be characterized as 'solicitation or orders' is sufficient to remove the protection of § 381[.]"

Commentators examining these two lines of authority have generally concluded that a "*de minimis* definition of solicitation is without legislative support." Tatarowicz, 38

Tax Lawyer at 305. Their rationale is straightforward: "Public Law 86-272 provides for no 'exceptions' to the statutory requirements that there must be *only solicitation of orders*, before an exemption from taxation will be granted." *Federal Limitations* § 9:12, at 507.

That the state courts will not achieve consensus on any of these issues is dramatically illustrated by contrasting the Wisconsin Supreme Court's decision below with the Arkansas Supreme Court's decision in *U.S. Tobacco Co. v. Martin*, 304 Ark. 119, 801 S.W.2d 256 (1990), decided only two months earlier. The Arkansas Supreme Court apparently found favor with the decision of the Wisconsin Court of Appeals; the Wisconsin Supreme Court rejected it. *Compare U.S. Tobacco*, 801 S.W.2d at 259 *with Wrigley*, 465 N.W.2d at 809. The Arkansas Supreme Court did not accept Pennsylvania's broad definition of "solicitation" in its earlier *U.S. Tobacco* decision; the Wisconsin Supreme Court embraced it. *Compare U.S. Tobacco*, 801 S.W.2d at 259, *with Wrigley*, 465 N.W.2d at 809-810. The Arkansas Supreme Court

determined that no *de minimis* exception of any kind exists: "It is not the frequency of the visits or volume sales however, upon which our decision turns. We are concerned with the *nature* of the Company's activities." *U.S. Tobacco*, 801 S.W.2d at 260. In contrast, the Wisconsin Supreme Court adopted a broad-based interstate commerce *de minimis* standard for both "solicitation" and "delivery" which is unparalleled in prior case law. *Wrigley*, 465 N.W.2d at 811-812. The differing approaches to the statute by these two courts are insoluble.

The conflict among the jurisdictions is both evident and more than sufficient to warrant plenary review.

III. THE ISSUE OF HOW INCOME SHOULD BE APPORTIONED WITH REFERENCE TO THE REQUIREMENTS OF PUB. L. NO. 86-272 DECIDED BY THE WISCONSIN SUPREME COURT CONSTITUTES AN IMPORTANT QUESTION OF LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. Lack of a uniform federal statutory standard leads to situations where multistate corporations escape taxation on certain income and to situations where multistate corporations are subjected to multiple taxation.

The problems associated with multiple definitions of a single federal statutory standard are most easily seen in "throwback" cases under Pub. L. No. 86-272. Throwback is the corollary to the immunity that may be claimed by foreign corporations under that statute:

> The purpose of the "throwback" rule is to prevent any part of the tax base from falling through the cracks into the "[n]o-man's land" of non-taxation. Under the "throwback" rule, the sales factor provides for attribution of sales of tangible personal property to the State of origin, when the taxpayer is not taxable in the State of the purchaser. The "throwback" provision seems to revert the sales receipts to the State from which the tangible personal property was shipped in those instances where Federal Constitutional limitations or Public Law 86-272 prohibits the purchaser's State from imposing an income, franchise or similar tax.

Federal Limitations § 9:12, at 394 (Supp. 1990). The throwback principle reassigns to a state in which the taxpayer is taxable sales receipts that would normally be assigned to a state in which the taxpayer is not taxable.

The problem is that most states throw back sales in a manner consistent with the "solicitation" standard they apply to foreign corporations under Pub. L. No. 86-272. Wisconsin is such a state. *Milwaukee Seasoning Laboratories, Inc. v. Wisconsin Department of Revenue*, Wis. Tax Rptr. [CCH] ¶202-652 (January 10, 1986). The result is often "nowhere" income that escapes taxation by any state, either because the foreign state does not impose tax under its own definition of "solicitation" or because the multistate corporation has chosen not to file in the foreign state. *See, e.g., Goldberg v. State Tax Commission*, 618 S.W.2d 635, 642 (Mo. 1981); *Ind. Dept. of State v. Continental Steel Corp.*, 399 N.E.2d 754, 756 (Ind. App. 1980); *Federal Limitations* § 9:14, at 518 and n.93.

Cases such as *John Ownbey* and *Coors Porcelain* also suggest that the potential for multiple taxation in such circumstances is very real. *Federal Limitations* § 9:12, at 503-504, 509; Hartman, *"Solicitation" and "Delivery" Under Public Law 86-272: An Uncharted Course*, 29 Vand L. Rev. 353, 395 (1976). *Also see*, Tatarowicz, 38 Tax

Lawyer at 325: "The various states' interpretations of solicitation lead to multiple taxation and create uncertainty as to one's tax liability and obligation."

Other examples are readily apparent from the Wisconsin Supreme Court's decision in *Wrigley* and the Arkansas Supreme Court's decision in *U.S. Tobacco*. Under the rationale of those decisions, Arkansas may fairly apportion the income of U.S. Tobacco, a corporation headquartered in Connecticut, but Wisconsin, which is now required to follow the "solicitation" standard applied by Pennsylvania to that very same taxpayer, may not. Similarly, Wrigley, a corporation headquartered in Illinois, will in all likelihood now be required to pay tax in Arkansas, but Wisconsin has been precluded from fairly apportioning income from those same activities. Moreover, every state that utilizes an intermediate standard similar to that employed by the Wisconsin Court of Appeals may now find support in that court's decision for assessing tax against Wrigley.

A uniform interpretation of Pub. L. No. 86-272 will eliminate these inconsistencies and significantly reduce the potential for multiple taxation and for the creation of "nowhere" income.

B. A single definitional standard would simplify state tax administration and eliminate taxpayer confusion.

Fifteen years after the enactment of the statute, one analysis of Pub. L. No. 86-272 suggested that "[i]f Congress fails to act . . . a decision by the United States Supreme Court interpreting solicitation would be helpful in bringing uniformity to the area." Note, *Public Law 86-272*, 27 Vand. L. Rev. at 339. Shortly thereafter, another suggested that "[a] decision, or perhaps a series of decisions, by the Supreme Court of the United States could help to remove this tapestry of confusion." Hartman, 29 Vand L. Rev. at 397 (1976). In over three decades since the enactment of the statute, Congress has done nothing. This "failure to have trustworthy guidelines on the meaning of 'solicitation of orders' and 'delivery' is most

unfortunate for *both* the taxpayer and the taxing authority." *Federal Limitations* § 9:14, at 518 (footnote omitted).

At present, "it appears practically impossible to distill from these cases a precise, uniform, predictively trustworthy interpretation of the scope of the[se] exemption[s]." Hartman, 29 Vand. L. Rev. at 389. There is therefore a compelling need to create "a standard on which multistate taxpayers [and state taxing authorities] may rely in conducting their business dealings." Tatarowicz, 38 Tax Lawyer at 293 n.5.

CONCLUSION

State courts of last resort have interpreted Pub. L. No. 86-272 in conflicting ways, applying drastically different legal standards in determining how and when immunity from fair apportionment consonant with due process principles is extended to foreign corporations. This lack of uniformity concerning the legal standards to be applied in attempting to fairly apportion income creates

tax problems both for states that impose income or franchise taxes and for multistate corporations with apportionable income. Pub. L. No. 86-272, a federal statute, should have a uniform interpretation that can be consistently applied by state courts, state tax tribunals, state taxing authorities and multistate corporations. Only this Court can supply that uniform interpretation.

It is therefore respectfully requested that a writ of certiorari issue to the Supreme Court of Wisconsin for the purpose of granting plenary review of that court's February 19, 1991, judgment in this matter.

Dated this 19th day of July, 1991.

JAMES E. DOYLE
Attorney General of Wisconsin

F. THOMAS CREERON III
Assistant Attorney General
State of Wisconsin
Counsel of Record

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8549

Attorneys for Petitioner

No. _____

In The

Supreme Court of the United States

October Term, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

Petition For a Writ of Certiorari
To The Supreme Court of Wisconsin

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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No. 88-2265

STATE OF WISCONSIN : IN SUPREME COURT

WILLIAM WRIGLEY, JR. CO.,

Petitioner-Respondent,

Filed
February 19, 1991

v.

WISCONSIN DEPARTMENT OF REVENUE,

Appellant.

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner-Appellant,

v.

WILLIAM WRIGLEY, JR. CO.,

Respondent-Petitioner.

REVIEW of a decision of the court of appeals. ***REVERSED.***

DAY, J. This is a review of a court of appeals decision which reversed an order of the circuit court for Dane County, the Honorable Martha J. Bablitch, Reserve Judge,

presiding. The circuit court, reversing an order of the Wisconsin Tax Appeals Commission, held that under 15 U.S.C. sec. 381, the Wisconsin Department of Revenue (DOR) does not have the power to tax the net income of the William Wrigley, Jr. Company (Wrigley) for the years 1973 to 1978. The circuit court found that Wrigley's activities in Wisconsin were "inextricably connected to 'solicitation,'" as that term is used in 15 U.S.C. sec 381. 15 U.S.C. sec. 381 provides in part as follows:

> (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce *if the only business activities within such State* by or on behalf of such person *during such taxable year are* either, or both, of the following:
>
> (1) *the solicitation of orders* by such person, or his representative in such State for sales of tangible personal property, which orders are *sent outside the State for approval or rejection, and if approved, are filled by shipment or delivery from a point outside the State*; (emphasis added). . . .

Because the circuit court held that the DOR is prohibited from assessing a tax on Wrigley, it did not decide the interest rate to be applied to the tax.

The DOR appealed, and the court of appeals reversed the order. *William Wrigley, Jr. Co., v. DOR*, 153 Wis. 2d 559, 579, 451 N.W.2d 444 (Ct. App. 1989) (Dykman, J., dissenting). The court of appeals determined that the solicitation of orders does not encompass post-sale activities which are not "'inextricably related'" to the solicitation of orders. *Id.* at 569. It held that since Wrigley engaged in such activities, Wisconsin is not prohibited from taxing Wrigley. *Id.* at 577. In addition, the court of appeals held that the franchise tax was "delinquent," and therefore subject to an eighteen percent penalty interest under sec. 71.13(1)(a)[1] and 71.10(9)(a),

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[1]Section 71.13(1)(a), Stats., (1985-86), provides in part as follows:

> Collection of delinquent taxes. (1)(a) Income and franchise taxes shall become delinquent if not paid when due under s. 71.10(9), and when delinquent shall
>
> be subject to interest at the rate of 1.5% per month until paid. . . .

1987 Act 312 renumbered the statute as sec. 71.82(2)(a).

Stats. (1985-86).[2] *Id.* at 579. Wrigley petitioned the court for review which was granted.

This case presents two issues for review: (1) Did Wrigley's activities in Wisconsin go beyond the "solicitation of orders" as that term is used in 15 U.S.C. sec. 381, so that Wisconsin may assess and collect a tax on Wrigley's net income for the years 1973 to 1978, and (2) if Wrigley's activities are taxable, are the assessed taxes "delinquent" and therefore subject to an eighteen percent penalty interest rate pursuant to sec. 71.13(1)(a), Stats.? We conclude that Wrigley's activities in Wisconsin did not go beyond the "solicitation of orders" as that term is used in 15 U.S.C. sec. 381. Therefore the DOR may not assess and

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[2]Section 71.10(9)(a), Stats., provides:

> **Section 71.10. Filing returns; payment of tax; tax refunds and credits; nonresident contractor's surety bond; withholding statements and wage reports. . . .(9)** All income and franchise taxes shall be paid to the department of revenue, at its office at Madison or at such other place the department designates. (a) Corporation franchise and income taxes not paid on or before the 15th day of the 3rd month following th close of the income year, shall be deemed delinquent.

collect a tax on Wrigley's net income for the years 1973 to 1978. Because we hold that the DOR is prohibited from taxing Wrigley's net income, we do not reach the second issue.

On October 6, 1980, the DOR issued Wrigley a "Notice of Franchise Tax Assessment." The notice stated that the DOR was assessing Wrigley $246,614.04 in franchise taxes for the years 1973 through 1978 because Wrigley had been engaging in corporate business activities in Wisconsin during those years. In addition, since Wrigley had not filed Wisconsin franchise tax returns, the DOR assessed Wrigley penalties, including an eighteen percent delinquent penalty interest.

Wrigley objected to the assessment, claiming that it did not engage in business in Wisconsin in a manner sufficient to subject it to Wisconsin's taxing jurisdiction. The DOR denied Wrigley's petition for a redetermination of taxes, and assessed Wrigley a total of $271,707.63 in taxes and penalties.

Wrigley appealed to the Tax Appeals Commission (Commission). On August 26 and 27, 1985, a hearing was held before Commissioner William Bradford Smith, acting as a hearing examiner. Before the Commission could issue a decision, Mr. Smith left the Commission because of a legislative reorganization. On November 18, 1986, the Commission rendered its decision without consulting Mr. Smith. It concluded that Wrigley's activities in Wisconsin went beyond the "solicitation of orders" protected by 15 U.S.C. sec. 381, and it upheld the DOR's assessment. The Commission also concluded that Wrigley was not subject to the delinquent penalty interest rate because the taxes had not yet become due, and could therefore not be considered "delinquent." Instead, the taxes were subject to the legal rate of interest, found in sec. 71.09(5)(a), Stats. (1985-86).[3]

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[3]Section 71.09(5)(a), Stats. (1985-86) provides:

> **71.09 Payment of estimated taxes.** **(5)(a)** In assessing taxes interest shall be added to such taxes at 12% per year from the date on which such taxes if originally assessed would have become delinquent if
>
> (continued...)

Both Wrigley and the DOR appealed. On August 20, 1987, the Dane County Circuit Court, Judge Michael Nowakowski, presiding, reversed the Commission's decision. The court found that since several of the Commission's findings might have been affected by the weight and credibility of the testimony at the hearing, due process required that the Commission consult Mr. Smith before deciding the case. The court also questioned some of the Commission's findings of fact, and stated that an analysis of Wrigley's activities was to be done on an annual basis, not in the aggregate. We note that 15 U.S.C. sec. 381 prohibits a state from imposing a net income tax "for any taxable year" if a person's business activities "during such taxable year" are limited to those described in the statute. *See also Ringgold Coal Mining Co. v. Taxation Division Director*, 4 N.J. Tax 321 (Apr. 29, 1982) (court analyzed company's activities on an annual basis). The

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[3](...continued)
unpaid, to the date on which such taxes when subsequently assessed will become delinquent if unpaid.

court did not reach the issue of the penalty interest rate assessment. The case was remanded to the Commission for further proceedings consistent with the court's ruling.

On remand, the Commission met with Mr. Smith and heard his views on the credibility of the witnesses and the weight to be accorded their testimony. Mr. Smith also filed a written statement with the Commission, stating that he found the Wrigley witnesses' testimony to be "extremely credible," and that he would have issued proposed findings of fact, conclusions of law, and an order in Wrigley's favor. A three-member majority of the Commission, with one member dissenting and one not participating, reinstated the original decision and order. The Commission clarified its original findings and specifically stated that it never questioned the credibility of the witnesses: their testimony was "completely accepted and accorded substantial weight."

Both Wrigley and the DOR appealed, and the circuit court consolidated their appeals. In examining the record, the circuit court found that some of the Commission's findings of fact were not supported by the evidence in the

record. In addition, the Commission "did not purport to examine the rationale of the statute itself (15 U.S.C. sec. 381), its legislative history, or the cases from other states which have construed it in a variety of circumstances." Instead, the Commission relied on the DOR's nexus regulations promulgated in 1979. It also relied on guidelines set forth in a resolution of the Multistate Tax Commission, a group of state revenue agents. *See* State Tax Guide, Multistate Taxation, sec. 351, (CCH 1980). In analyzing Wrigley's activities, the Commission applied these guidelines, which were not cited by either party, and did not refer to case law, cited by both parties.

The circuit court, in interpreting 15 U.S.C. sec. 381, analyzed the approaches other state courts have taken and the statute's legislative history. The circuit court concluded that the activities of Wrigley's salespeople were "solicitation" or so "inextricably connected to solicitation" as to amount to the same thing. Finally, the court stated that even if some of Wrigley's activities were viewed as

sales, they were "infrequent exceptions to Wrigley's practice and of *de minimis* value compared to its total revenues." Finding Wrigley not liable for the franchise tax, the court did not reach the penalty interest issue.

The DOR appealed. In a split decision, the court of appeals reversed. *Wrigley*, 153 Wis. 2d at 579. Although it acknowledged that the circuit court's opinion was "thoughtful, thorough and well-reasoned," the majority of the court of appeals concluded there was substantial evidence to support the Commission's order. *Id.* at 571. Additionally, in determining which activities of a company go beyond "solicitation," the court employed a pre-sale/post-sale test. *Id.* at 577. It held that solicitation included "acts which, according to custom and practice in the particular industry, are those that lead to the placing of orders by customers." *Id.* at 569. The court of appeals also held that "solicitation of orders" should not encompass "post-sale activities that are not closely or 'inextricably related' to the solicitation of orders." *Id.* The court concluded that Wrigley engaged in such post-sale

activities, lending evidentiary support to the Commission's order. *Id.* at 571. The court of appeals also held that Wrigley was liable for the eighteen percent delinquent penalty interest on the tax. *Id.* at 579.

Judge Dykman, in his dissent, stated that "the majority should have analyzed this case in the context of the manner by which the chewing gum industry sells its product." *Id.* at 580. Wrigley's salespeople were making the product attractive to induce customers to place an order. *Id.* Creating an attractive display is an important part of selling gum – an "impulse sale" product. *Id.* Judge Dykman stated that the sum of Wrigley's activities does not remove Wrigley from the protection of 15 U.S.C. sec. 381. *Id.* Instead, the sum of the questioned activities is *de minimis*. *Id.* at 581.

Wrigley petitioned for review, and on February 20, 1990, this court granted Wrigley's petition.

Wrigley is an Illinois corporation engaged in the business of manufacturing and selling chewing gum products. Its headquarters are in Illinois. It files tax

returns in Illinois and in eight other states in which it has sales offices, warehouses, and/or manufacturing facilities. In addition, Wrigley has been declared to be under the protection of 15 U.S.C. sec. 381 in New York and North Dakota, where it engages in activities similar to those performed in Wisconsin. (Transcript of Hearing, August 26, 1985, pp. 33-35).

Wrigley is not licensed to do business in Wisconsin; nor has it ever filed a tax return or paid taxes in Wisconsin. From 1973 to 1978, Wrigley's volume of sales in Wisconsin ranged from $2,797,055 to $4,392,202.

During the years in question, 1973 to 1978, Wrigley had few contacts with the state of Wisconsin. It did not own or lease any real estate in Wisconsin; it had no bank accounts; it did not own or operate a manufacturing or "warehouse facility;" it had no telephone listing; it did not own or operate a training facility; and it did not store inventory, other than samples carried by sales representatives.

All orders for Wrigley products were approved in Chicago. All pricing and credit transactions took place in Chicago as well. The deliveries for orders solicited by agents in Wisconsin were made from outside the state by common carrier.

Wrigley's advertisements, including television and radio spots, appeared in Wisconsin. The company also placed coupon ads in Wisconsin newspapers. All such advertising was purchased and managed through an independent advertising agency in Chicago.

From 1973 to 1978, Wrigley had several types of sales employees working in Wisconsin. The sales or "field" representatives solicited orders within a territory. The regional sales managers would oversee the field representatives in the several territories of their assigned region. They would also solicit "key" accounts within the region. Finally, the district managers were responsible for the several regions which made up their districts.

From 1973 through 1978, Wrigley employed four or five field representatives to service Wisconsin accounts.

Most of the field representatives lived in Wisconsin, and each one was supplied with a company car. Wrigley reimbursed the field representatives for gas and service expenses, business expenses, and long distance phone charges.

The field representatives were responsible for soliciting orders from approximately thirty to fifty direct accounts. A direct account is primarily a wholesaler, billed directly for products it receives from a Wrigley manufacturing facility. The field representatives were also responsible for regularly contacting between 400 and 650 indirect accounts. An indirect account is primarily a retailer that receives products from a wholesaler.

John Kroyer, a district manager during the period in question, testified that:

> Wrigley chewing gum [is] approximately a ninety-four or ninety-five percent impulse item; in other words, it's not a planned purchase. . . .[I]t's one thing that's of utmost importance that we have fresh product available to the consumer at all times. . .[E]ventually it's going to affect your sales. . . .You have to have it visible to the consumer. They will not ask for

> it. . . .So sales and merchandise goes hand in hand due to the nature of our product.

Therefore, when contacting retailers, the field representatives ensured that the retailers had adequate inventories of all brands and pack sizes of gum, permitting the retailers to effectively display and promote Wrigley products. This involved replacing stale gum with fresh gum when the product was outdated at no cost to the retailer. Gum has a "shelf life" of about six months. The stale gum was disposed in a Wisconsin landfill or sent back to Chicago by common carrier to be destroyed.

The field representatives also engaged in "agency stock checks" about once a month. This occurred when a field representative put up a new stand and stocked it with gum because the retailer did not want to wait for a wholesaler to come and fill the stand. The field representative would send a report called an "agency stock check" to the Wrigley office in Chicago. The office would then bill the wholesaler. The wholesaler would bill the account and replace the field representative's supply of product with the amount with

which the field representative stocked the account's stand. This amount was usually fifteen to twenty dollars worth of gum.

The product used for agency stock checks and exchanging stale gum for fresh gum came from the field representative's supply of gum. Each of the four or five representatives carried a supply of gum with a wholesale value of approximately $1,000, with thirty-five to forty percent of the supply being stale gum. This supply of "samples" was carried as inventory on Wrigley's books.

Another way in which the field representatives increased sales was to set up display racks for accounts. These display racks were furnished to an account free of charge. Once the display rack was set up, title to it would pass to the account. The field representatives were not required to account to Wrigley for the display racks. Wrigley did not carry the racks as inventory or fixed assets.

In 1976, after Wrigley terminated one particular field representative, the company needed a place to store the

representative's company car and supply of products until a new representative was hired. Normally, the company would store the car at a dealership, but in this instance the district manager could not locate a reasonable rental space for the car. Wrigley allowed the district manager to rent storage space in a warehouse, in his own name, for the three to four month interim until a new representative was hired. The rental cost of approximately twenty-five dollars per month was charged to the district manager's expense account.

After the new field representative was hired, he had no room to store the gum and displays in his home. Wrigley gave him permission to continue the warehouse rental for storage space. This was not Wrigley's common practice, but based on the specific facts of the situation, the company made an exception to the rule. The storage space was rented through the year 1978.

From 1973 to 1978, Wrigley employed two different individuals who served as the regional sales manager for Wisconsin. John Kroyer had this position from 1973 to

1976, and Gary Hecht was the regional sales manager from 1976 to 1978. Both of these individuals lived in Wisconsin and worked out of their home during their employment. Kroyer testified that Wrigley issued him a file cabinet for his in-home office. In addition, he declared an income tax deduction for the office in his home. Like the field representatives, the regional sales managers had a company car, and Wrigley reimbursed them for gas and service expenses, business expenses, and long distance phone charges.

The regional sales managers were responsible for increasing volumes, sales, distribution, and improving merchandising. They were also directly responsible for "key" accounts - the direct accounts which made up eighty percent of the company's total volume. Kroyer testified that eighty to eighty-five percent of his time was spent working in the field on sales activities. Administrative activities made up the other percentage of his time. Hecht, on the other hand, testified that he spent ninety to

ninety-five percent of his time in the field engaging in supervisory or managerial activities.

When a field representative vacancy arose, the regional sales manager would get permission from the Chicago office to fill the vacancy. He would then locate applicants, using an employment agency or by placing an ad in a newspaper. The regional manager would interview applicants at a coffee shop or restaurant, or sometimes at a hotel. The applicant would be hired if the district manager approved of the regional sales manager's recommendation. The regional sales manager did not have authority over a field representative's compensation, nor did he have the authority to discharge a field representative. However, regarding one particular field representative, Hecht testified: "I'm not entirely certain if I fired [him] or if he quit. I just can't remember." The regional sales managers did make recommendations to the district manager regarding the field representatives' compensation and performance, but the district manager always had the "final say" in the matter.

Once a new field representative was hired, the regional sales manager was responsible for training. From 1973 to 1978, Wrigley did not have a formal training program or a training center. Instead, the regional sales manager would instruct the new employee to accompany another top field representative in the field. So while the new employee was being trained, the field representatives were working the territory. Kroyer testified that "[a]ll the training was done in the field."

About once or twice a year, the regional sales manager would hold a sales meeting with all the field representatives of his region. Kroyer usually conducted the meetings out of his home. Hecht held the meetings at a hotel or motel. The meetings usually lasted about a full day and involved strategies to obtain greater sales. Occasionally, a sales meeting would be held in conjunction with the introduction of a new brand of gum or new packaging. The regional sales managers' other communications with the field representatives were made

by telephone, in written form, or in a one-to-one meeting, usually held at a coffee shop.

Wrigley's "position description" of the regional sales manager, dated September, 1979, states that the regional sales manager "represents the company on credit problems as necessary." When questioned about this duty, Hecht testified, "I have no idea what that refers to. It's never came up in the nine or ten years that I have been regional sales manager, and nobody has ever brought to my attention on my performance appraisals that I was neglecting one of my duties." Hecht did receive copies of correspondence from the Wrigley credit department. He did not take any action on these letters. When Kroyer received a copy of a credit letter, he would occasionally identify the credit problem and try to get the account and the credit department to communicate in order to solve the problem.

Overseeing the regional sales manager was the district manager, who was responsible for all activities that took place in his district. This included making decisions on

hiring, firing, compensation, and sales strategies. The district manager spent very little time in Wisconsin, approximately six to nine days a year. These days were spent either in the field calling on a customer, or attending a sales meeting.

Whether or not Wrigley's activities go beyond "solicitation of orders" under 15 U.S.C. sec. 381 requires the application of facts to a statute. This is a question of law. *Local No. 695 v. LIRC*, 154 Wis. 2d 75, 82, 452 N.W.2d 368 (1990). "'The black letter rule is that a court is not bound by an agency's conclusions of law.'" *Id.* (citing *West Bend Education Ass'n. v. WERC*, 121 Wis. 2d 1, 11, 357 N.W.2d 534 (1984)). In some instances, however, a court will give deference to an agency's interpretation of a statute. *West Bend*, 121 Wis. 2d at 12. Section 227.57(10), Stats., (1987-88) provides that in reviewing an agency's decision "due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it." In addition,

"[w]hen the legislature charges an administrative agency to apply and enforce a particular statute. . .the agency's construction and interpretation of the statute are entitled to great weight and any rational basis will sustain its practical interpretations." *School Dist. of Drummond v. WERC*, 121 Wis. 2d 126, 132-133, 358 N.W.2d 285 (1984). As the court of appeals determined, sec. 73.01(4)(a), Stats. (1987-88)[4] does not specifically empower the Commission to interpret the federal statute at issue here. *Wrigley*, 153 Wis. 2d at 565. We agree with the court of appeals that the Commission's decision should not be given great weight.

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[4]Section 73.01(4)(a), Stats. (1987-88) provides in part:

> **73.01 Tax Appeals Commission. (4)(a)** Subject to the provisions for judicial review contained in s. 73.015, the commission shall be the final authority for the hearing and determination of all questions of law and fact arising under sub. (5) and ss. 70.11(21), 70.38(4)(a), 70.64, 70.995(8), 72.86(4), 1985 stats., 76.38(12)(a), 76.39(4)(c), 76.48(6), 77.26(3), 77.59(6)(b), 78.22, 139.03(4), 139.315 and 139.78 and subch. XIV of ch. 71.

Further, "where a legal question is intertwined with factual determinations or with value or policy determinations or where the agency's interpretation and application of the law is of long standing, a court should defer to the agency which has primary responsibility for determination of fact and policy." *West Bend*, 121 Wis. 2d at 12 (footnote omitted). The court in *West Bend* also noted that "[w]here the question is 'very nearly' one of first impression, and the agency has not developed expertise or a body of precedent on the question, the court is to give the agency's conclusion 'due weight' or 'great bearing' but not 'great weight.'" *Id.* n. 12; *see also Local 695*, 154 Wis. 2d at 83. Even though an agency may have never interpreted a particular statute against facts of first impression, because the agency has prior experience in interpreting the statute, the agency's decision will be accorded due weight or great bearing. *See Local 695*, 154 Wis. 2d at 84.

Finally, "[w]here a legal question is concerned and there is no evidence of any special expertise or experience, the weight to be afforded an agency interpretation is no

weight at all." *Id.* The scope of "solicitation" under 15 U.S.C. sec. 381(b)(1) has never been interpreted by the Commission under a set of facts similar to Wrigley's, nor under any set of facts at all. The DOR stated in its brief that "the precise scope of the statute was not at issue until its. . .decision in this case." For this reason, we review the Commission's interpretation of "solicitation" *de novo*. Additionally, we give no deference to the decisions of the circuit court and court of appeals on this question of law. *See Eby v. Kozarek*, 153 Wis. 2d 75, 79 450 N.W.2d 249 (1990).

As to the Commission's findings of fact, it stated that its "findings were based on the unimpeached, credible testimony of petitioner's own witnesses which are supported by the record." Since it is the Commission's function to determine the credibility of the witnesses and the weight of the evidence, we will affirm the Commission's findings of fact "if they are supported by substantial evidence in view of the entire record." *Muskego-Norway*

C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis. 2d 540, 562, 151 N.W.2d 617 (1967).

Article 1, sec. 8, clause 3 of the United States Constitution gives Congress the power to regulate interstate commerce. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). This includes the power to regulate state taxation, to the extent that it affects interstate commerce. *Arkansas-Best Freight System, Inc. v. Cochran*, 546 F. Supp. 904, 910 (M.D. Tenn. 1981). On September 14, 1959, Congress exercised this power when it enacted Public Law 86-272, codified in 15 U.S.C. sec. 381. The law prohibits a state from taxing income derived from interstate commerce if the only activities of the out-of-state person within the state are the solicitation of orders sent outside the state for approval and shipment. "Hence, the immunity provisions. . .are not available if, for example, the out-of-state company maintains a warehouse or a stock of goods within the State." S.Rep. No. 658, 86th Cong., 1st Sess. 2, *reprinted in* 1959 U.S. Code Cong. & Admin. News 2548, 2554. 15 U.S.C. 381 does not define

which activities are included in "solicitation of orders." Further, the one instance in which the United States Supreme Court addressed the application of the statute, it did not define the scope of "solicitation of orders." *See Heublein, Inc. v. South Carolina Tax Comm'n.*, 409 U.S. 275 (1972). "We need not decide whether, as the State urges, the actions of Heublein's representative in maintaining a local office, meeting with retailers, distributing promotional literature, and personally delivering some orders to the wholesaler, do not fall within the term 'solicitation.'" *Id.* at 278.

Since the statute does not define the meaning nor the scope of "solicitation of orders," we turn to the legislative history of 15 U.S.C. sec. 381 to determine its effect and purpose. *See Labor & Farm Party v. Elections Board.*, 117 Wis. 2d 351, 355-356, 344 N.W.2d 177 (1984). Citing *Hervey v. AMF Beaird, Inc.*, 250 Ark. 147, 464 S.W. 2d 557 (1971), the DOR contends that "the legislative history of the act clearly indicates that a narrow construction of the term 'solicitation of orders' was intended by Congress." *Id.*

at 562 (citing 2 U.S. Code Cong. & Adm. News 2548 et. seq. (9th Cong., First Session, 1959). The court in *Hervey* does not specifically identify any language in the legislative history which leads it to this conclusion.

We fail to see how the legislative history "clearly indicates" a narrow construction of "solicitation of orders." According to Senate Report No. 658, in support of 15 U.S.C. sec. 381, the statute was meant to

> deal with the problem arising by reason of a recent decision of the U.S. Supreme Court in Northwestern States Portland Cement Co. v. State of Minnesota and T.V. Williams, Commissioner v. Stockham Valves & Fittings, Inc. (79 S.Ct. 357, 358 U.S. 450 3 L.Ed.2d 421 (1959).
>
> Your committee finds that the broad language used by the Supreme Court in its decision in these cases-
>
> > We conclude that net income from the interstate operations of a foreign corporation may be subjected to State taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State *forming sufficient nexus to support the same*. (358 U.S. 450 at 452).
>
> has created considerable concern and uncertainty. (Emphasis supplied.) . . .

> This apprehension is apparently strengthened by the decision of the Louisiana Supreme Court in the Brown-Forman case, which the U.S. Supreme Court refused to review. There the activities of the corporation within the State were apparently limited to the presence of 'missionary men' engaged in solicitation. (footnotes omitted).

S. Rep. No. 658, 2549. In *Northwestern States*, the court upheld a Minnesota Tax on the income of an Iowa cement manufacturer who sent salespeople into Minnesota to solicit orders and to encourage orders from cement users ordering from local wholesalers. 358 U.S. at 454-455. The company also maintained a sales office in Minnesota. *Id.* at 454.

In *Brown-Forman Distill. Corp. v. Collector of Revenue*, 234 La. 651, 101 So. 2d 70, 72 (1958), *cert. dismissed*, 350 U.S. 28 (1959), the court refused to disturb the ruling which allowed the state of Louisiana to tax a Kentucky whisky company. The company's "missionary men" called on wholesalers and also assisted salespeople in obtaining suitable displays for retailers in Louisiana. *Id.* at 70.

This apprehension created by *Northwestern States* and *Brown-Forman* was due to the burden placed on companies attempting to ascertain, with respect to every state in which sales were made, the company's taxable income, and the portion of that income "properly apportioned" to the taxing state. S. Rep. No. 658 at 2549-2550. Moreover, each of the states which were taxing business income were using "different definitions and different formulas - thus guaranteeing major compliance headaches for all businesses crossing state lines." *State Taxation of Interstate Commerce: Hearing Before the Committee of Finance*, 86th Cong., First Sess. 4 (1959) (Statement of Sen. John Sparkman).

The Committees studying the legislation concluded that "the uncertainty of interstate tax liability and inevitable new reporting, accounting and tax costs presented a real threat which was inducing retreat of business from the free markets and the deprivation of consumer goods and services to the detriment of the American economy." *International Shoe Co. v. Cocreham*,

246 La. 244, 164 So.2d 314, 321, *cert. denied*. 379 U.S. 902 (1964) (citing State & Local Tax Report No. 122, sec. 2, page 4). To relieve this undue burden on interstate commerce, Congress enacted P.L. 86-272, which takes a "'minimum activities' type of approach" in determining when a company is subject to a state's income tax. S. Rep. No. 658 at 2548. "Section 381 was designed to define clearly a lower limit for the exercise of that power [a state's power to tax]. Clarity that would remove uncertainty was Congress' primary goal." *Heublein*, 409 U.S. at 280.

States have not been uniform in interpreting the meaning of "solicitation of orders." The DOR cites as compelling *National Tires, Inc. v. Lindley*, 68 Ohio App. 2d 71, 793, 426 N.E.2d (1980) and *Clairol, Inc. v. Kinsley*, 262 A.2d 213, (N.J. 1970), *cert. dismissed*, 402 U.S. 902 (1971) (dismissed for want of a substantial federal question), two cases which narrowly interpret "solicitation of orders."

In *National Tires*, the appellant, National Tires, "constantly upgraded stock, maintained current inventories, removed old, defective products and ensured

proper credit for them, advised sellers on methods to improve their inventory, negotiated sales between jobbers and dealers, completely changed over competitive products to the Modac line - in short, appellant helped run these businesses in Ohio." 426 N.E.2d at 798. The court found that these activities enabled National Tires to "assume control over its Ohio operations." *Id.* Thus, National Tires' business in Ohio involved "'something more than solicitation.'" *Id.*

In *Clairol*, Clairol sold products to salon wholesalers and had "detail people" having a "technical background" call on beauty salons. 262 A.2d at 217; *see also*, *Ringgold Coal Mining Company v. Taxation Division Director*. They did "very little as far as order taking." *Clairol*, 262 A.2d at 217. The court held that "Clairol's business activities in New Jersey extend beyond the mere solicitation of orders either on its own behalf or on behalf of its wholesalers." *Id.* at 217-218.

The courts in *National Tires* and *Clairol* did not define solicitation. They merely concluded that the activities in

those cases exceeded solicitation. Moreover, in *National Tires*, the company was actually assisting in the operation of the business of its customers. Since Wrigley's activities are not similar to those of *National Tires* or *Clairol*, we do not find either case persuasive.

The DOR cites a number of other cases where courts have found no protection under 15 U.S.C. sec. 381 for various types of businesses, *i.e.*, *National Tires* and *Clairol*. Most of these cases are distinguishable on their facts. Others represent an approach to 15 U.S.C. sec. 381 that we conclude is repugnant to the intent of Congress in passing the legislation. *See United States Tobacco Co. v. Martin*, 304 Ark. 119, 199 Ark. LEXIS 598 (December 17, 1990) (J. Turner, dissenting).

Finally, the DOR cites tribunals which have interpreted solicitation to include only those activities leading to the placement of orders. *See, e.g., Drackett Products Co. v. Conrad*, 370 N.W.2d 723, 726 (N.D. 1985); *Miles Laboratories, Inc. v. Department of Revenue*, 546 P.2d 1081, 1083 (274 Or. 395 (1976); *In the Matter of Raymond*

E. Campbell & Associates, Ltd., Iowa Department of Revenue and Finance, Iowa Tax Rptr. (CCH) secs. 200-483 (1988). The court of appeals adopted a similar interpretation of solicitation. *Wrigley*, 153 Wis. 2d at 569. "[I]t [solicitation] should not include those acts which follow as a natural result of the transaction . . . ." *Id.*

Although the pre-sale/post-sale test may produce consistency and predictability, the test places all the emphasis on *when* the activity occurred. It fails to take into account the *nature* of a company's activities. As Wrigley points out, post-sale activities may share the same qualities and purposes as pre-sale activities: encouraging future orders.

In interpreting "solicitation of orders" under 15 U.S.C. sec. 381, we follow "the well-established rule of statutory construction that nontechnical words and phrases are to be construed according to their common and ordinary usage." *State ex rel. B'nai B'rith F. v. Walworth County*, 59 Wis. 2d 296, 307, 208 N.W.2d 113 (1973). Further, "'[t]he popular

or reasonable import of words furnishes the general rule for the interpretation of public laws.'" *Id.* (quoting *State Bank of Drummond v. Nuesse*, 13 Wis. 2d 74, 78, 108 N.W.2d 384 (1961).

To solicit is "to approach with a request or plea (as in selling or begging)." *Webster's Third New International Dictionary of the English Language*, p. 2169 (unabridged) (1961). We agree with the Pennsylvania court in *United States Tobacco Co. v. Com.*, 478 Pa. 125, 386 A.2d 471, 478, *cert. denied*, 439 U.S. 880 (1978), that the definition of solicitation not only encompasses a "sales pitch," but it also includes activities incidental to the initial contact between the buyer and the seller:

> When Congress enacts legislation exempting 'solicitation' by an interstate corporation from a state's net income tax, and does so in response to a case where the 'solicitation' involved activity [Brown-Forman] incidental to the initial contact between seller and prospective buyer, we as state courts are bound to give foreign corporations sec. 381 immunity even though their representatives engage in activities incidental to the initial contact between buyer and seller. The question is one of degree.

Id.

In *United States Tobacco*, the Pennsylvania court held that the United States Tobacco Company was protected under 15 U.S.C. sec. 381, and therefore did not have to pay corporate income tax in that state. 386 A.2d 479. The company employed representatives who called on various retail outlets. *Id.* at 472. These representatives carried samples of new products, purchased from a wholesaler. *Id.* If a retailer purchased some samples, the retailer paid the representative the same amount the representative paid the wholesaler for the samples. *Id.* United States Tobacco's representatives also made sure the company's products were fresh and attractively displayed. *Id.* They also set up counter displays and sometimes gave retailers free samples of tobacco products in exchange for more extensive counter space. *Id.* The court stated:

> [W]e have said that acts of courtesy performed by business solicitors, in order to satisfy or accommodate customers, did not go beyond solicitation; nor was it relevant that the solicitors were provided facilities to carry on their solicitations (citations omitted). The import of these decisions is that 'solicitation' does not stop at the moment a prospective customer [or wholesaler] is asked to consider purchasing the seller's goods: other practices incident to the initial contact between buyer and seller, such as advice on making the product attractive to the ultimate consumer, also fall under the rubric 'solicitation.'

Id. at 478. Like Wrigley's activities in Wisconsin, all of United States Tobacco's activities "were a kind of solicitation activity - as much so as the exchanging of friendly amenities between a solicitor and the potential customer." *Id.*

In a similar case, *Gillette Co. v. Tax Comm.*, 56 A.D.2d 475, 481, 393 N.Y.S. 2d 186 (1977), the New York Tax Commission claimed that Gillette's activities went beyond "solicitation" of orders in that state. Gillette manufactures and sells personal care products. *Id.* at 477. It employed salespeople who called on indirect accounts in New York and told the accounts about changes in products and promotions. *Id.* at 478. The salespeople also reviewed the account's display of Gillette products to ensure that the products were attractively displayed and in saleable

condition. In annulling the franchise tax against Gillette, the New York court stated:

> Although it is not possible to state a general rule demarcating solicitation from merchandising, certainly where, as here, the complaining taxpayer owns no real or personal property [except salesmen's samples] in the state and makes no repairs on its goods after sale, the purpose of Public Law 86-272 would be frustrated by permitting the tax. Advice to retailers on the art of displaying goods to the public can hardly be more thoroughly solicitation, i.e., in this contest, an effort to induce purchase of Gillette products.

Id. at 482.

It is important to note that the New York State Tax Commission, relying on *Gillette, United States Tobacco*, and a New York revenue ruling, has recently determined that Wrigley is entitled to a refund for New York franchise taxes it paid for the years 1975 through 1980. *In the Matter of the Petition of William Wrigley, Jr. Company*, State Tax Comm'n. (March 11, 1987). Wrigley's activities in New York were nearly identical to its activities in Wisconsin:

> 15. Since a fresh product was necessary for continued sales, if a representative found out-of-date product in a display the

> representative would exchange, on a stick-for-stick basis, the out-of-date product with fresh product drawn from a small stock of product in his possession. Petitioner did not charge the indirect account for this exchange. The supplies of petitioner's products which were held by the sales representatives at any time, therefore, consisted of both saleable and unsaleable product and had negligible value.
>
> 16. On occasion, a sales representative replaced either out-of-date or undisplayed product with stock in an indirect account's storage area.
>
> 17. Occasionally, petitioner supplied an indirect account with a display stand on which to display petitioner's product. Petitioner's sales representatives would also participate either alone, or with sales representatives of other companies, in the arrangement of displays. Petitioner supplied these display stands to a retailer free of charge and did not own the stands or consider the stands to be inventory. The stands were purchased from suppliers throughout the United States and were often shipped directly to a customer. . . .In all cases where a sales representative rented garage space to store the automobile, such space was rented by the representative individually and not in the name of petitioner.

Id. In interpreting solicitation to include "some activities incidental to offering tangible personal property for sale or pursuing offers for the purchase of tangible personal property," the Commission found that Wrigley's activities

in New York constituted "solicitation" within the meaning of 15 U.S.C. sec. 381. *Id.*

The Commission, in its decision in the case before us, determined that Wrigley engaged in the following activities in Wisconsin which, taken together, exceeded "solicitation of orders."

- replacement of stale gum
- maintaining product displays both as to location design and content
- direct sales of gum by use of 'agency stock checks'
- maintaining offices in home
- conducting regular and periodic training seminars in Wisconsin
- recommending hiring, firing and raises of sales representatives in Wisconsin by regional manager
- involvement in credit transactions by regional manager
- training and supervising sales representatives by regional sales manager
- rental of storage space in Madison, Wisconsin
- the purchase of non-incidental advertising in Wisconsin

Earlier in this opinion, we have set forth in detail the testimony from which this list of summarized activities derives.

In the context of the facts in this case and considering the nature of the chewing gum business, as did Judge Dykman in his dissent, we hold that each of Wrigley's activities in Wisconsin during 1973-1978 were incidental to the solicitation of orders of gum. Any activities described here that could be considered as somehow not being inextricably bound up in solicitation, such as the rare occasions when credit problems were looked into, are so minor as to be *de minimis*. Certainly we do not think they could be of sufficient weight in the flow on interstate commerce as to remove Wrigley from the protection of 15 U.S.C. sec. 381.

When analyzing a claimed immunity under 15 U.S.C. sec. 381, a court should look at whether the activities are closely associated and inextricably bound up with "solicitation of orders." The mere fact that these orders may be future orders does not necessarily result in loss of

immunity. Courts should also analyze what is alleged to be "deviations from the norm" and *de minimis* activities. As in the case before us, such activities do not reach a level of activity resulting in loss of immunity. Further, the court should consider activities that are *not* performed, with special reference to Congress' examples of non-immune activities in a state: maintaining a warehouse or a stock of goods. S.Rep. No. 658 at 2554. Not only what is done, but what is *not done* in a state bears on the question of whether activities are "solicitation of orders." Finally, the court must consider the type of business involved, and the manner in which products are sold and orders are solicited -- such as the sale of gum in the case before us, and the sale of tobacco products in *United States Tobacco*.

As the testimony revealed, gum is an "impulse item." In order to sell, it must be fresh and attractively displayed. Replacing stale gum and maintaining product displays are an important part of obtaining more orders for gum. Moreover, these activities are not "sales." The fresh gum and displays were supplied to customers free of charge.

Nor are the "agency stock checks" sales: The field representative never negotiated a price for the gum, never billed the account, and never accepted money for the gum.[5]

As for the regional sales manager's activities, they were part of effectively managing the solicitation of orders. As such, these activities were incidental to the solicitation of orders.

The rental storage space is certainly not the type of warehouse Congress envisioned when it referred to a company losing immunity under 25 U.S.C. sec. 381 for

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[5]In his dissenting opinion to the Commission's Order, Commissioner Douglass Bartley commented on the *de minimis* value of the "agency stock checks," which he referred to as "direct sales."

> Although there is no question that the sales were direct, I conclude that such sales can only be characterized as unusual and infrequent because they were but a pittance. For example in 1978, direct sales amounted to at most $600, or 7/100,000 of one per cent of Wrigley's $4,392,202 of Wisconsin sales that year. Looking at this in a slightly different perspective, direct sales of Wrigley's gum were barely enough to supply three avid, two-pack-a-day chewers with enough Juicy Fruit to last through the year. That's not enough gum to stick jurisdiction on Wrigley even if the chewers are doubling their pleasure.

maintaining a warehouse. *See* S. Rep. No. 657 at 255. The space was rented for several months to store a representative's company car and supplies. It does not approach the size or type of warehouse needed to store inventory in order to supply the wholesalers and retailers in this state. At the most, it was a minor and *de minimis* deviation from the usual practice.

Regarding the advertising, it too is an important part of soliciting orders. As a medium to alert potential customers of the existence and availability of a company's product, the appearance of Wrigley's ads in Wisconsin are incidental to solicitation of orders for the product.

We would hardly expect Wrigley to cross the state line any time it must engage in activities incidental to placing an order for gum. This would surely be a burden on interstate commerce and would "tend to 'balkanize the American economy,' a result which it was Congress' purpose to prevent." *Gillette Co. v. Tax Comm.*, 56 A.D.2d at 482.

We conclude that Wrigley's activities in Wisconsin did not go beyond the "solicitation of orders" as that term is used in 15 U.S.C. sec. 381. Therefore, the DOR may not assess and collect a tax on Wrigley's net income for the years 1973 to 1978.

By the court:--The decision of the court of appeals is reversed.

No. 88-2265

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT IV

WILLIAM WRIGLEY, JR., CO.,

Petitioner-Respondent,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Appellant.

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner-Appellant,

v.

WILLIAM WRIGLEY, JR., CO.,

Respondent.

APPEAL from an order of the circuit court for Dane county: MARTHA J. BABLITCH, Reserve Judge. *Reversed and cause remanded with directions.*

Before Eich, C.J., Gartzke, P.J., and Dykman, J.

EICH, C.J. The Wisconsin Department of Revenue appeals from a judgment reversing a decision of the Tax Appeals Commission. The commission upheld a franchise tax assessment against the William Wrigley, Jr., Company, an Illinois manufacturer of chewing gum which markets its products in Wisconsin and other states. The department assessed taxes and delinquent interest for the years 1973 through 1978, and Wrigley appealed to the commission on grounds that the assessment was prohibited by federal law. The commission upheld the assessment, but ruled that the department had applied an improper rate of interest. On review, the circuit court reversed and the department appealed.

The issues are: (1) whether the assessment is barred by the provisions of 15 U.S.C. sec. 381, which allow state taxation of income from interstate commerce only if the company's business activity within the state is confined to the "solicitation of [sales] orders"; and (2) if not, whether the assessed taxes were "delinquent" within the meaning of sec. 71.10(9), Stats. (1985-86), so as to justify

application of an eighteen percent (1.5 percent per month) interest rate on the balance due. The trial court, voiding the assessment, did not reach the question of the proper interest rate. An ancillary issue concerns the scope of our review -- whether we owe any deference to the commission's interpretation of a federal law.

We conclude that while we owe no deference to the commission in this instance, it nonetheless correctly determined that the assessment was not barred by federal law. We also conclude that the department applied the correct rate of interest. We therefore reverse the judgment of the trial court and remand with directions to enter an order affirming the commission's decision on the validity of the assessment and reversing its determination on the appropriate rate of interest to be applied to the assessment.

I. SCOPE OF REVIEW

The parties agree, as did the trial court, that the primary issue is the interpretation of 15 U.S.C.

sec. 381 -- particularly the scope and meaning of the term "solicitation of orders."

We employ different standards for reviewing the findings of fact and conclusions of law of administrative agencies. The agency's factual findings will be upheld if supported by substantial evidence in the record. Sec. 227.57(6), Stats. The construction of a statute, however, is a question of law. Generally, we decide such questions independently, owing no deference to the trial court or, in this case, to the administrative agency. *In Interest of C.A.K.*, 147 Wis. 2d 713, 715, 433 N.W.2d 298, 299 (Ct. App. 1988).

Exceptions are made, however, for agencies' interpretations of statutes they are charged by the legislature to administer and enforce. In such situations the agency's interpretation of the statute is entitled to great weight if it reflects a practice or position long continued, substantially uniform and without challenge by governmental authorities and courts. *School Dist. of Drummond v. WERC*, 121 Wis. 2d 126, 132-33, 358

N.W.2d 285, 288-89 (1984). In such cases, we will sustain the agency's interpretation if it has any rational basis. *Id.*

Even where the higher "great weight" standard of deference is inapplicable, courts will accord "due deference" to an agency's application of the law to found facts when the agency has particular competence or expertise in the matter at hand. *Dept. of Revenue v. Milwaukee Refining Corp.*, 80 Wis. 2d 44, 48, 257 N.W.2d 855, 857 (1977), or where the decision is intertwined with value and policy judgments appropriate to the agency's administration of the law. *Transp. Dept. v. Transp. Com'r*, 135 Wis. 2d 195, 199, 400 N.W.2d 15, 16 (Ct. App. 1986). But no such deference is required where the courts are as competent as the agency to decide the question presented. *Milwaukee Refining Corp.*, 80 Wis. 2d at 48, 257 N.W.2d at 858.

Under more usual circumstances, we would accord some deference to the commission's decision in this case, based as it is on the interpretation of a law in a field in which it has expertise. Here, however, the statute subject to interpretation is an act of Congress, not a law created by

the Wisconsin Legislature. Like all administrative agencies, the commission was created, structured and empowered by the legislature for the primary purpose of "determin[ing] . . . all questions of law and fact arising under [specified provisions of the Wisconsin Statutes]." Sec. 73.01(4)(a), Stats. But whatever deference may be appropriate to the interpretation of particular sections of the Wisconsin Statutes by an agency created by the Wisconsin Legislature to do just that, we fail to see how or why similar deference should be accorded to the agency's interpretation of federal law.

The department responds with a brief reference to two cases, both cited for the proposition that deference must be paid in such a situation: *Tecumseh Products Co. v. Wisconsin E.R. Board*, 23 Wis. 2d 118, 127-29, 126 N.W.2d 520, 524-25 (1964), and *Milwaukee v. ILHR Department*, 106 Wis. 2d 254, 257-59, 316 N.W.2d 367, 369-70 (1982). We do not read either case as so holding. *Tecumseh Products* involved the Wisconsin Employment Relations Board's interpretation of the word "job" in a collective

bargaining agreement, and the court appropriately paid deference to the board's expertise in construing such agreements. The *Tecumseh Products* court's reference to "federal law" had nothing to do with the scope of review of the agency's interpretation. It was simply a statement in another section of the opinion that the board "ha[d] jurisdiction to apply federal common law of collective-bargaining agreements in resolution of disputes under [Wisconsin] Stat[utes]." *Id.*, 23 Wis. 2d at 129, 126 N.W.2d at 525.

The reference to *Milwaukee v. ILHR Dept.*, is similarly unavailing, for there the court's reference to the deference to be accorded the agency's interpretation referred to its interpretation of a Wisconsin statute. *Id.*, 106 Wis. 2d at 257, 316 N.W.2d at 369. The reference to "federal law" was only to illustrate the statute's conformity with federal statutes. *Id.*, 106 Wis. 2d at 259, 316 N.W.2d at 369-70.

We conclude, therefore, that whatever deference courts may owe to a state agency's expertise and function when it interprets acts of the Wisconsin Legislature, no such

deference is owed when the agency is interpreting statutes or rules of the federal government.

II. 15 U.S.C. Sec. 381 AS A BAR TO THE ASSESSMENT

The commission, after discussing the facts of Wrigley's business activities within the state, concluded that 15 U.S.C. sec. 381 did not prohibit assessment of Wisconsin franchise taxes to the company because its Wisconsin activities comprised more than the mere "solicitation of orders" within the meaning of the law. In so deciding, it adopted and applied a set of guidelines prepared by the Multistate Tax Commission (MTC), an association of state revenue officials, to the facts of Wrigley's activities in Wisconsin. The parties spend considerable time arguing the propriety of the commission's use of such extralegal "guidelines" as the benchmark for its decision here. While we share Wrigley's concern that the commission may have exceeded its authority by doing so, because we review its

conclusions *de novo* we need not decide the propriety of the commission's use of the MTC materials.

It is generally accepted that 15 U.S.C. sec. 381 was enacted in response to the decision of the United States Supreme Court in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), and its denial of certiorari in *Brown-Forman Distill. Corp. v. Collector of Revenue*, 101 So.2d 70 (La. 1958), *cert. denied*, 359 U.S. 28 (1959).

In those cases the Court upheld state taxation of the income of multistate businesses with little activity in the taxing states other than the presence of sales offices (*Northwestern*) and so-called "missionary men" who solicited local wholesalers and sometimes assisted them in obtaining product display paraphernalia for use in retail stores (*Brown-Forman*). According to reports accompanying the bill that became 15 U.S.C. sec. 381, these decisions prompted "serious apprehension" in the commercial community that mere solicitation activities by multistate businesses would subject them to multiple state

taxation. *U.S. Tobacco Co. v. Com.*, 386 A.2d 471, 474 (Pa.), *cert. denied*, 439 U.S. 880 (1978), citing S. Rep. No. 658, 86th Cong., 1st Sess. 2, *reprinted* in 1959 U.S. Code Cong. & Admin. News 2548. Thus, 15 U.S.C. sec. 381 was the congressional response to *Northwestern States* and *Brown-Forman* -- a law passed to "allay the fear that 'mere solicitation' would subject interstate businesses to multiple state taxation." *Tobacco Co.*, 386 A.2d at 474.

Courts in other jurisdictions considering the language of 15 U.S.C. sec. 381 have varied in their interpretations of the "solicitation" provisions of the law. The narrowest view, that obtaining in New Jersey and Arkansas, among other states, is that "solicitation of business" must be strictly limited to the specific task of asking a customer to purchase one's product. *Clairol, Incorporated v. Kingsley*, 262 A.2d 213, 217-18 (N.J. Super. Ct. App. Div.), *aff'd*, 270 A.2d 702 (1970), *appeal dismissed*, 402 U.S. 902 (1972). Under this view, the taxpayer must "bring itself within the statute [by showing] that the *only* business activity on its behalf in [the taxing state] was the solicitation of orders

[for sales of tangible personal property]." *Hervey v. AMF Beaird, Inc.*, 464 S.W.2d 557, 561-62 (Ark. 1971) (emphasis in original).

A slightly more liberal view -- really a middle ground -- is that held by, among others, the Oregon court: that is, that "solicitation" also includes those generally accepted or customary acts in the industry which lead to the placing of orders. *Miles Laboratories, Inc. v. Department of Revenue*, 546 P.2d 1081, 1083 (Or. 1976).

The broadest position finds favor in Pennsylvania and New York. The Pennsylvania Supreme Court, in *Tobacco Co.*, 386 A.2d at 478, held that permissible "solicitation" under 15 U.S.C. sec. 381 included "sundry activities so long as those activities [are] closely related to the eventual sale of a product" -- activities that are "incident to soliciting," whether they lead up to the sale or follow it.

Our reading of 15 U.S.C. sec. 381 in light of the facts underlying its enactment and the views of state courts that have considered it leads us to conclude that it was intended, in the words of *Miles Laboratories*, to exempt not

only the actual solicitation of orders as that term is commonly understood, but also those acts which, according to custom and practice in the particular industry, are those that lead to the placing of orders by customers. We agree with the Pennsylvania Supreme Court that, while the Senate Report supports a relatively narrow construction of the term "solicitation," it must reasonably include activities beyond a simple sales pitch -- something more than merely "send[ing] salespeople into another state who leave brochures describing their employer's products, hoping the prospective customer will then take the initiative to contact the employer for possible sale." *Tobacco Co.*, 386 A.2d at 478. The concept must include other activities so long as they are closely or "inextricably" related to the eventual sale of the product. *Id.* Thus, presale activities such as "visiting retail outlets, introducing new products, and advising retailers on making attractive displays of . . . products" should not, by themselves, subject the company to taxation. *Id.*

However, we do not believe that "solicitation of orders" should encompass post-sale activities that are not closely or "inextricably related" to the solicitation of orders. Thus, it should not include those acts which follow as a natural result of the transaction, such as collections, servicing complaints, technical assistance and training, and similar activities. *Miles Laboratories*, 546 P.2d at 1083.

The application of 15 U.S.C. sec. 381 to a particular interstate business is, of necessity, a case-by-case determination based on the facts establishing the "nexus" -- or lack of it -- between the company's activities and the taxing state.

In the opinion accompanying its order, the commission determined that Wrigley employees carried on the following "non-immune" activities within the State of Wisconsin during the years in question: (1) replacing stale gum; (2) maintaining product displays both as to location, design and content; (3) direct sales of gum through "agency stock checks"; (4) maintaining offices in home; (5) conducting regular and periodic training seminars;

(6) recommending hiring, firing and salary increases for sales representatives; (7) involvement in credit transactions;[1] (8) training and supervision of sales representatives; (9) rental of storage space; and (10) purchase of "nonincidental" advertising in Wisconsin. The commission concluded that, taken together, these were "considerable activities" within the state which "transcended the solicitation of orders protected by [15 U.S.C. sec. 381]."

Examining the commission's findings, the circuit court concluded that there was no evidence that "regular and periodic" training seminars were held in Wisconsin. The court then discussed "qualif[ying]" evidence relating to

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[1]When the case was initially appealed to the circuit court, the court noted that the commission's finding regarding the regional sales managers' participation in credit decisions was unclear. On remand, the commission clarified the finding. In the years in question -- 1973 through 1978 -- Wrigley had two different managers for Wisconsin, one from 1973 to 1975, and another from 1976 on. The commission, noting that the company's job description for the position called for the regional manager's participation in credit transactions, stated that only the 1973-75 manager did so, and, further, that its decision was not grounded on that fact alone, but on the "totality" of the company's activities.

several of the remaining findings and concluded that none of the company's activities went beyond those that are "necessarily incident to the efficient practice of soliciting orders in fields remote from headquarters," and thus did not transcend "solicitation," as that term is used in 15 U.S.C. sec. 381. Wrigley advances the same position on appeal -- that the commission's findings lack evidentiary support.

As we have said, we review the commission's decision independently, owing no deference to the trial court's determination. And while the trial court's decision in this case was thoughtful, thorough and well-reasoned, we take a different view of the evidence. Our own reading of the record leads us to conclude that there is substantial evidence to support the commission's order.

The substantial evidence rule is not a preponderance-of-the-evidence test, but an inquiry into whether reasonable minds could arrive at the same conclusion reached by the commission. *Farmers Mill of Athens, Inc. v. ILHR Dept.*, 97 Wis. 2d 576, 579, 294

N.W.2d 39, 41 (Ct. App. 1980). The fact that the evidence is in conflict is not grounds for reversal, for it is the commission's function, not ours, to weigh and determine the credibility of, and to draw inferences from, the evidence. *Id.* at 580, 294 N.W.2d at 41. We note also that, when one or more inferences reasonably may be drawn from the evidence, the choice of inferences is an act of fact-finding, and the inference drawn by the agency is conclusive. *Id.* And when we review an agency's decision, our task is to search for evidence to support that decision, not for evidence which would support a different or contrary result. *Gilbert v. Medical Examining Board*, 119 Wis. 2d 168, 194, 349 N.W.2d 68, 79-80 (1984); *Hawes v. Germantown Mutual Ins. Co.*, 103 Wis. 2d 524, 543, 309 N.W.2d 356, 364 (Ct. App. 1981).

Taking the commission's findings *seriatim*, we believe there is ample evidence to support its initial determination that Wrigley's Wisconsin sales representatives maintained product displays and replaced stale or outdated products at various retail outlets throughout the state. Richard

Radosevic, former Wisconsin sales representative, testified that he would carry about $1,000 worth of gum and other products with him on his rounds, along with forty to seventy-five cases of "display racks [and related] equipment." He would check stores' existing supplies of gum for "outdatedness" and would "exchange . . . stale product for fresh products," destroying the stale gum. According to Radosevic, he set up and placed display racks in stores on a "daily" basis.

The commission also found that the sales representatives made direct sales of gum to retailers through what was known as "agency stock checks." Radosevic testified that sometimes -- perhaps once a month -- when he was setting up and placing a display rack for a retailer he would fill the rack with gum and would bill the wholesaler for the products left in the store, and the wholesaler would then bill the retailer. The papers prepared to arrange these billings were known as "agency stock checks."

The evidence in support of the commission's findings that Wrigley personnel conducted "regular and periodic training seminars" in Wisconsin and otherwise trained and supervised the field representatives may be found in the testimony of the company's district manager, John Kroyer, and that of Gary Hecht, the regional manager. According to Kroyer, each new sales representative was trained "in the field," under the direction of the regional manager, for a period of about four weeks before going out on his or her own. In addition, in the years in question (1973-76) Kroyer "occasionally" conducted meetings with his Wisconsin "sales force." He stated that in the three-year period such meetings "probably averaged one a year . . . ." They were held either in Kroyer's home or in a motel or hotel. He described them "sales meetings" where the participants discussed "mainly sales strategy . . . how we could get additional volume, how we could improve content merchandising . . . how we could get greater sales." Kroyer would also meet with various sales representatives individually, "generally [in] a coffee shop," to discuss "sales

and potential sales and maybe whether we were going in the wrong direction with an account, methods to improve those communications." He testified that one of his responsibilities was to check to see how the sales representatives were performing -- how they were "grasping the job," whether they had any "weaknesses," whether they were "taking advantage of merchandising opportunities," and similar matters. He also acknowledged that he was the sales representatives' "immediate supervisor" and that, as such, he "basically determined the[ir] day-to-day activities."

Hecht testified that it was his practice to conduct day-long group meetings with Wisconsin representatives once or twice a year, usually in a hotel. The purpose of the meetings, according to Hecht, was to "communicate" with the representatives on the company's "major thrust[s] or objective[s] such as the introduction of a new brand or a new packaging . . . ." Hecht also described his supervision of the sales representatives, including "periodic" evaluations of their sales presentations and other aspects

of their work, assigning specific duties to them, re-drawing sales territories and similar activities. In addition, Richard Radosevic, in his capacity as one of Wrigley's "key account sales managers" attended at least one meeting of Wisconsin sales representatives in order to "go over various company goals and objectives."

The finding that Wrigley's Wisconsin managers recommended the hiring, firing and salary increases for sales representatives is also supported by the testimony of John Kroyer. Kroyer acknowledged that he had "hired" at least one field representative during his three-year term as Wrigley's regional manager in Wisconsin. While he stated that he did not have the "final say" in hirings, he acknowledged that when a vacancy occurred, he "handled the process of locating an applicant and interviewing him." He would then make the "final selection" and communicate his "recommendation" to the company's district manager in Chicago for approval. Kroyer also described how he once "fired" a sales representative -- calling it "a rather spontaneous on the spot dismissal," although he again

stated that the "ultimate decision [resided] with the district manager." When asked about his own role in the process, however, Kroyer said simply: "I terminated him [for poor job performance.]" He stated that before he did so he had told his supervisor that "if I found what I thought I'd find" in investigating the representative's performance, "I was going to dismiss [the employee], and he [the manager] agreed." Finally, Kroyer acknowledged that he would make recommendations for pay raises for sales representatives under his direction. Here, too, Kroyer's superior, the district manager, had the final "say" in the matter.

The commission also found that Wrigley's Wisconsin personnel had been "involved" in customer credit matters. This finding also has support in the record. Kroyer testified that, in his capacity as regional manager, he would occasionally "get involved" with "credit problems" involving Wisconsin accounts. Wrigley's Chicago office would provide Kroyer and other regional managers with copies of letters sent to customers with credit problems in

the various managers' territories. When Kroyer felt that the company was getting "nasty" with a good account in his area, he would "intercede" in the matter in an attempt to resolve the dispute. Sometimes Kroyer would "take [disputes] to [Wrigley's] credit department on behalf of the account to see if we couldn't get some shipments made." He stated that he saw his job as being "kind of a mediator" in such situations, and that he would engage in these activities "probably a couple, three times a year."

There was also evidence supporting the commission's finding that, on one occasion at least, Wrigley rented storage space in Wisconsin. When Kroyer terminated an employee in 1973, he rented space in a Madison warehouse to store the company car, cases of gum, display materials and similar goods. He was reimbursed by Wrigley for the rental expenses. When the replacement was hired, the new person continued to rent the warehouse space and the lease was still in effect three years later when Kroyer left the area to take another position. Finally, we note extensive discussion in the record relating to Wrigley's

advertising efforts, both in Wisconsin and elsewhere, including Wisconsin ads on radio, television and "coupon" ads in state newspapers.[2]

In addition, there was evidence that Kroyer maintained an office in his home in Wisconsin, using at least some company-furnished equipment. He was not reimbursed for any office expenses other than the telephone bills, but he did take a home/office deduction on his income taxes. He maintained the office to aid him in "coordinat[ing] the sales activities and keep[ing] my thumb on top of all regional activities."

There is, as we have said, other evidence which may be read to contradict some of the testimony referred to above. But, as we have also said, our task is not to look for evidence to support a decision the agency could have, but did not, make -- nor even to weigh the evidence; it is

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[2]The department does not explain how such advertising exceeds the "solicitation of orders" limitation in 15 U.S.C. sec. 381, and we do not rely on it on this appeal. Even without such a finding, there is ample evidence to support the commission's ultimate determination.

simply to determine whether there is substantial evidence to support the decision made. The testimony just discussed leads us to answer that question in the affirmative.

The inquiry then becomes whether the found facts support the conclusion that Wrigley's Wisconsin activities go beyond the solicitation of orders, as that term appears in 15 U.S.C. sec. 381, and as we have interpreted it in this opinion. Again, we believe that they do. While the rental of space and the intervention in credit matters may not have been regular duties of Wisconsin representatives, the warehouse rental continued for a period of years and Kroyer's self-described "involve[ment]" in matters relating to customer credit occurred on at least a semi-regular basis -- at least two or three times a year. So, too, the setting up of displays, by itself, would not and should not subject Wrigley to state taxation. These activities, however, must be considered in light of the other evidence of Wrigley's "presence" in Wisconsin, which the testimony indicated were many and varied. In addition to those just mentioned, Wrigley personnel were engaged in: conducting

both "occasional" and semiannual sales meetings; operating month-long field training programs for new employees; providing representatives with individual $1,000 product inventories, some of which would be used by the representatives to stock store display racks on a regular basis, whereupon the retailer would be billed through an "agency stock check" procedure; and maintaining direct supervisory control over individual representatives, which supervision included not only the representatives' daily work, but also most of the hiring, firing and salary-setting activities.

The peculiar facts of this case, then, lead us to conclude that Wrigley was engaged in something more than the solicitation of orders in the State of Wisconsin in the years in question, for they include acts that go beyond those that are inextricably related to such solicitation and generally considered to lead to, rather than follow, the placing of orders. Wrigley's Wisconsin employees were not just "missionaries." They were hirers, firers, meeting organizers, trainers, customer credit "intervenors" or

"mediators," renters of warehouse space, stale product replacers, inventory-carriers, display stockers, sellers and billers. We conclude that 15 U.S.C. sec. 381 did not bar the State of Wisconsin from subjecting Wrigley to its franchise tax.

III. THE INTEREST PENALTY

The Department of Revenue imposed interest of 1.5 percent per month on the taxes assessed to Wrigley. The percentage is that applicable to "delinquent" income and franchise taxes under sec. 71.13(1)(a), Stats. (1985-86), which provides that "[i]ncome and franchise taxes shall become delinquent if not paid when due . . . and when delinquent shall be subject to interest at the rate of 1.5% per month until paid . . . ."

The commission disagreed, holding instead that sec. 71.13(2), Stats. (1985-86), applied. That section states that "[a]ny *additional* income or franchise *tax assessment* contested before the tax appeals commission or in the courts, which is finally determined to be correct, shall

become delinquent if not paid on or before the 30th day following the date on which the order or judgment representing such final determination becomes final and conclusive." (Emphasis added.)

Concluding that the assessment represented "additional taxes" which could not become "delinquent" until at least thirty days after a final decision in Wrigley's action contesting the tax -- the commission ruled that the so-called "penalty" interest provisions of sec. 71.13(1)(a), Stats. (1985-86), were inapplicable, and that interest could not exceed the legal rate.

The department, pointing to sec. 71.10(9)(a), Stats. (1985-86), which states that corporate income and franchise taxes are "deemed delinquent" if not paid on or before the fifteenth day of the third month following the close of the income year, contends that Wrigley's taxes were in fact delinquent and that the penalty interest rate is thus appropriate.

We agree with the department, and we find the reasoning of dissenting Commissioner Junceau to be

particularly persuasive on whether this was an "additional assessment" within the meaning of sec. 71.13(2), Stats. (1985-86). Wrigley had never reported or paid franchise tax in any of the years under review. The assessment came as a result of a field audit conducted by the department "for the purpose of making a determination of the [company's] taxable income . . . ." Sec. 71.11(20)(b), Stats. (1985-86). Under sec. 71.11(20(c), if the audit reveals "that no assessment has been made when one should have been made, the department shall make a correct assessment . . . ." Thus, the statutes under which the assessment was made contemplate an initial, rather than an "additional" assessment. The latter term must, as Commissioner Junceau suggests, "assume[] the filing of a return and self-assessment or some other previous assessment."

We have some sympathy with Wrigley's position that where, as here, a taxpayer believes it owes no tax and thus files no returns, and it is later determined after extensive agency and judicial proceedings that taxes were in fact due

in the years in question, it makes sense to treat the due date for penalty purposes as some time after the final court determination of liability. But the legislature has plainly spoken in secs. 71.13(1)(a) and 71.10(9)(a), Stats. (1985-86). Under the latter, a tax is delinquent if not paid by the stated due date; and under the former, delinquent taxes are subject to interest at the rate of 1.5 percent per month. We see no room in the statutory language for the result sought by Wrigley. The department correctly applied the applicable statutes in its imposition of statutory interest on Wrigley's assessment.

By the Court.--Order reversed and cause remanded with directions to enter an order affirming the decision of the Wisconsin Tax Appeals Commission insofar as it upheld the franchise tax assessment and reversing the decision insofar as it authorized imposition of interest on the assessment at a rate lower than 1.5 percent per month.

Publication in the official reports is recommended.

No. 88-2265

DYKMAN, J. (*dissenting*). It is undisputed that 15 U.S.C. sec. 381 was enacted to overturn *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), and to dispel the "serious apprehension" about that case. It is also undisputed that Congress intended to exempt not only solicitation, but "also those acts which, according to custom and practice in the particular industry, are those that lead to the placing of orders by customers" Maj. op. at 10. Therefore, the majority should have analyzed this case in the context of the manner by which the chewing gum industry sells its product. Instead, the majority adds up acts which it concludes make a list long enough to take Wrigley out from the protection of 15 U.S.C. sec. 381.

The circuit court focused on the way chewing gum is sold. Eighty-five to ninety percent of Wrigley's sales managers' time is spent soliciting. Over ninety percent of Wrigley's sales are "impulse sales." Thus, a customer's observation of a Wrigley product must create the desire to

purchase, or the business activity fails. If the customer, when observing a Wrigley display, recalls a taste of stale gum, or if the display is sloppy, dirty, or unattractive in any way, the sale may not occur. The display must contain the customer's preferred flavor. It is not surprising therefore, that a Wrigley's sales manager does whatever necessary to maintain an attractive display. His or her activities in relation to that display are therefore without a doubt for the purpose of "inducing customers to place orders."

Of course, the sales managers did not tend to the displays in a vacuum. When Pennsylvania focused on the use of a company car as evidence that sales managers were doing more than "mere solicitation" the court replied, "Congress could hardly have intended to exempt only walking solicitors." *United States Tobacco v. Commonwealth*, 386 A. 2d 471, 478 (Pa.), *cert. denied*, 439 U.S. 880 (1978).

Congress could have hardly intended to exempt solicitors without records or a place to keep them, or to

make exemption dependent upon whether solicitors met on occasion to compare notes or hear of the latest fad in consumer taste. With eighty-five to ninety percent of a sales representative's time spent soliciting, and some time devoted to record keeping, very little time remained to engage in the list of duties the majority finds dispositive.

I would view these other activities, not by the length of the list, but as the *de minimis* result reached when all are totalled. When I do so, I reach the same result as did the circuit court. I would therefore affirm and not reach the question of whether an interest penalty is applied.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCHES 3, 8

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner-Respondent,

vs.

MEMORANDUM DECISION AND ORDER

Case Nos. 87-CV-7478
87-CV-7468

WILLIAM WRIGLEY JR. COMPANY,

Respondent-Petitioner.

Both parties seek review, pursuant to ch. 227, Stats., of a decision and order of the Wisconsin Tax Appeals Commission (commission) dated November 25, 1987. The matters were consolidated by order of this court on September 9, 1988.

The William Wrigley Jr. Company (Wrigley) seeks review of that part of the commission's order which upholds the imposition of a franchise tax on its sales in Wisconsin for the years 1973 through 1978 by the

Wisconsin Department of Revenue (department). Wrigley contends that Wisconsin lacks jurisdiction to impose the tax by operation of Public Law 86-272 (15 U.S.C. 381), which provides that no state shall have power to impose a tax on income derived from interstate commerce if the only business activities of the taxpayer within the state are solicitation of orders sent outside the state for approval and shipment.

The department seeks review of that part of the commission's order disallowing the imposition of interest on the tax in question at the delinquent tax rate pursuant to sec. 71.13(1), Stats. It contends that the 18 percent rate of interest imposed by this section, rather than the lower rates of interest imposed by section 71.09(5)(a), Stats.,[1] is applicable to foreign corporations which fail to file returns in this state even when such a corporation acts, as here, on advice of counsel that it is immune from taxation under federal law and has no liability or obligation to file under Wisconsin law.

PRIOR PROCEEDINGS AND REMAND

The commission's decision and order of November 25, 1987 reinstated in its entirety--with one substantive clarification--its earlier decision and order dated November 18, 1986, which had also been the subject of both parties' petitions to review in Dane County Circuit Court. That decision had been based upon the transcripts of a two-day hearing on August 26 and 27, 1985 before then-Commissioner William Bradford Smith, sitting as a hearing examiner, on Wrigley's appeal of the department's assessment to the full commission.

Because of a legislative reorganization of the commission, Mr. Smith's term of office effectively expired in October 1985. The newly constituted commission did not consult with Mr. Smith in rendering its November 18, 1986 decision upholding the imposition of the franchise tax during the tax years in question. Circuit Court Judge Michael Nowakowski agreed with Wrigley's contention that due process required such a consultation since several of the commission's findings of fact might have been affected

by the weight and credibility of the testimony of witnesses it had no opportunity to observe. The court consequently remanded the case to the commission for that purpose. It did not reach the interest rate issue raised by the department.

Following remand, all five members of the commission met with former Commissioner Smith and heard his views concerning the credibility of Wrigley's witnesses and the appropriate weight to be accorded their testimony. In addition, Smith filed a statement of his impressions indicating that he found these witnesses' testimony to be "extremely credible," and indicating further that he would have issued proposed findings of fact, conclusions of law, and order in favor of Wrigley based upon that uncontroverted testimony.

With the chairperson of the commission not participating, and another member dissenting, a three-member majority of the commission reinstated the original decision and order. After setting forth clarifications to certain of the commission's original

findings, as hereinafter noted, the decision and order on remand specifically stated that the credibility of the witnesses "was never questioned or in issue by this Commission." It stated further:

> That testimony was completely accepted and accorded substantial weight. . . .This Commission never believed or concluded or intended to intimate [in its earlier decision] that. . .any. . .witness lied or was in any way untruthful."

Aside from the testimony adversely elicited by Wrigley's counsel from a compliance representative of the department, the only testimony in the record is that of five Wrigley employees. Their testimony, which the commission has found to be credible, is consistent, and is not controverted by the department.

FACTS

Wrigley is an Illinois corporation which manufactures and sells chewing gum products nationwide. Its headquarters are in Illinois. It has sales offices, warehouses, and/or manufacturing facilities in eight other

states, not including Wisconsin. It files tax returns in these states and in Illinois. It has never filed a tax return or paid taxes in this state, nor is it licensed to do business in Wisconsin.

During the years in question, the dollar volume of Wrigley's sales in Wisconsin ranged from $2,797,055 in 1973 to $4,392,202 in 1978. Following a field audit, the department issued a franchise tax assessment against Wrigley on October 6, 1980 in the total amount of $246,641.04, including penalties and interest, for the years 1973 through 1978. Wrigley's petition for redetermination was denied by the department on September 2, 1981, and Wrigley appealed to the commission.

The undisputed evidence adduced at the hearing establishes that Wrigley sells gum throughout the country in a substantially uniform manner, employing a hierarchical system of sales or "field" representatives who solicit orders within a specific territory; regional sales managers who oversee the field representatives in the several territories of their assigned region, and who

themselves solicit "key accounts" within that region; and district managers, who have ultimate managerial authority over the several regions in their districts.[2]

During 1973 through 1978, four or five field representatives serviced Wrigley's Wisconsin accounts. Most of them lived in Wisconsin; some of them also serviced areas in other states adjacent to Wisconsin. Each of these individuals was responsible for soliciting orders for Wrigley products from 20 to 40 "direct accounts," primarily wholesalers who received shipments of Wrigley products directly from Wrigley's manufacturing facilities outside this state. They were also responsible for paying regular visits to between 400 and 650 "indirect accounts," primarily retailers who received Wrigley products through Wisconsin wholesalers. These visits were made with the objective of increasing sales to the ultimate consumer, and thus orders for Wrigley gum, by maintaining and checking the retailer's present inventory for quantity, type, and freshness of Wrigley products and the placement and appearance of those products in displays in the retail

establishment, and by presenting promotional information explaining new products and packaging suitable to the particular retail establishment. All orders were sent to Chicago for credit approval and processing. Sales representatives had no authority to set or negotiate prices, to determine credit-worthiness of customers, or to make collections.

Two different individuals served as regional sales manager for the Wisconsin sales territories during these years, both of whom lived in Wisconsin during their tenure in that capacity. The district manager for the Mid-Western district, which encompassed Wisconsin, lived and was headquartered in the Chicago area throughout the period in question.

Wrigley supplied each field representative and each regional manager with a company car, and reimbursed each for gas and service expenses, as well as for business expenses such as overnight lodging, meals, and long distance phone charges. Each individual also received a supply of sample gum products, various types of display

racks, and promotional literature. These supplies were kept by the individual employee at home, typically in a garage or basement, with the exception of one field representative hired in 1973, who lived in an apartment. Because he had no garage or basement available, this individual was allowed to rent storage space in his own name in a commercial facility. Wrigley reimbursed him for the expense, which was about $25 per month. This was an exception to company policy.

The retail value of the quantity of gum in the possession of the field representatives at any one time was about $1,000, although up to 40 percent of this quantity at any time might be stale products which had been removed from customers' premises for subsequent destruction, and thus of no value. This gum was carried on Wrigley's inventories, and each representative was required to account for it. Display cases, which were placed free of charge in customer's premises, were not carried on Wrigley's inventories or accounted for by field representatives.

Because Wrigley products are primarily "impulse" purchases by the ultimate consumer, the location and appearance of product displays in individual premises was considered to be of primary importance in soliciting accounts. New displays were placed in retail account premises on a daily basis by Wrigley sales representatives, and were thereafter considered to be owned by these accounts. Usually these displays were filled from stock on hand in the account's facility. When this was not possible, they were filled with gum carried by the sales representative. On these occasions, about once a month, the representative would typically fill out an "agency stock check" indicating the amount of gum supplied. This "stock check" would be forwarded to the Chicago office, which would bill the account's wholesaler, who would in turn bill the retail account. Alternatively, the sales representative would replenish his own supply of gum from the account's wholesaler, who would then bill the account. In no case did any account pay the sales representative for the gum provided.[3]

Field representatives also used the supply of gum they carried to replace stale gum on the premises of their accounts. The gum packages bear a product-freshness expiration date. Unsold gum on hand past that date was replaced with fresh product; the stale gum was usually boxed and sent to Chicago by common carrier and occasionally destroyed locally. No charge was made to the account for the replacement, which was treated as an exchange. The purpose of the exchange was to increase sales by ensuring that the ultimate customer received fresh gum, thus attracting additional purchases.

Regional managers performed many of the same duties as field representatives with respect to "key" accounts. In addition, they supervised, evaluated, and made hiring, firing, and promotional recommendations to the district manager with respect to the field representatives in their regions. The district manager had the final authority concerning all personnel decisions; he could, and did, override the regional manager's recommendations at will.

When vacancies occurred in the field, the sales manager would interview applicants who responded to in-state newspaper ads or whose names had been obtained by word-of-mouth or from job placement agencies in Wisconsin. These interviews would take place in a Wisconsin hotel, motel or restaurant. The Chicago district manager had the final say in all hiring decision.

New-hires received on-the-job training in the field accompanied by experienced field representatives.[4] On occasion, the sales manager would accompany a field representative in visiting accounts, both for purposes of evaluating the field representative and his territory, and of demonstrating effective sales techniques. The sales manager would also sometimes meet with one or more field representatives in order to discuss sales strategy, and these meetings would take place at a motel or coffee shop in Wisconsin.

John Kroyer, the regional manager who served in Wisconsin between 1972 and March, 1976 testified that he spent between 80 and 85 percent of his time "in the field"

in active solicitation of accounts, alone or in the company of a field representative, and the balance of his time on administrative duties. He "occasionally" held meetings with his entire sales force, "probably averag[ing] one a year when we got everybody together." These meetings were held at his home and, on one occasion, at a motel with members of another region's sales force following the introduction of a product package change by Wrigley. The occasional meetings "were mainly sales strategy meetings, how we could get additional volume, how we could improve content merchandising. They were all related to sales, how we could get greater sales."

Kroyer answered affirmatively when asked whether he maintained an office in his home. Subsequently he testified that this office consisted of a corner of his basement, where he had a desk and phone. He kept all his files, including personnel files, and "everything pertaining to the job" in this corner. He had one company-issued file cabinet. He took a tax deduction for this space on a square foot basis. Wrigley did not reimburse him in connection

with this office, and there is no suggestion in the record that he met customers or field representatives there.

Kroyer also testified that on some occasions, "[p]robably a couple, three times a year," he had "interceded" or tried to "mediate" in credit disputes involving "a really good account." He testified: "I never interceded. . .until a letter got rather nasty with a really good account. Then I would intercede to the point where I would see if I couldn't get the account [and] Chicago together to find out what the problem might be, but I never tried to collect." Both sales managers and field representatives routinely received copies of correspondence from the Chicago office to accounts regarding credit problems. All other testimony pertaining to these letters is that they were routinely ignored and discarded.

Gary Hecht, the regional sales manager for Wisconsin during March 1976 through 1978 testified that he spent 90 to 95 percent of his time soliciting sales in the field, and "a very small portion" of time in sales meetings. Once or twice a year, day-long meetings were held, typically at a

hotel or motel, "when the company had a major thrust or objective such as the introduction of a new brand or a new packaging," where "details were important to communicate accurately and necessitated getting together with the field representatives face to face." The balance of his time was spent performing administrative duties, primarily written or oral communications with Chicago, and in telephone communications with his field representatives.

The record contains a variety of personnel reports all tending to establish that among a regional manager's administrative dutes was the duty to evaluate the performance of his field representatives and to make various recommendations concerning their salaries and continued employment, and that his own performance was similarly being evaluated by his superiors during the years in question.

The department introduced into evidence a September 1979 job description for the position of regional sales manager which listed as a "principle activity" of the job:

"Represents the company on credit problems as necessary."

When asked about this language, Hecht responded:

> I have no idea what that refers to. It's never come up in the nine or ten years that I have been regional sales manager, and nobody has ever brought to my attention on my performance appraisals that I was neglecting one of my duties. So I really have no idea what that means.

Wrigley advertises extensively nationwide on television, on radio, and in newspapers, and this advertising appears regularly in Wisconsin. The commission found that spot television and radio advertising for Wrigley products was purchased during the years at issue in several Wisconsin cities, and that some of the newspaper advertising which appeared in newspapers printed and sold in Wisconsin included coupons which the reader could clip and present to retailers for a premium or reduced price on Wrigley products. The evidence is undisputed, however, that all such advertising was managed and purchased through an advertising agency in Chicago. The commission did not mention this fact in its findings. None of Wrigley's Wisconsin employees had any

input into or control over any type of advertisement appearing in Wisconsin.

Wrigley owns no real estate and operates no manufacturing or warehousing facility in this state. It has no bank accounts, business office or address, or telephone listing in this state. The business cards carried by its agents list only a Chicago-area business address and phone number. All deliveries of orders solicited by its Wisconsin agents are made from outside the state by common carrier. All orders for Wrigley products are approved or disapproved in Chicago, where all pricing and credit matters, including collections, are also handled. Although it solicits orders in all states in the nation, it pays taxes only in the nine states in which it has corporate offices, warehouses, or manufacturing facilities. No other state has imposed the equivalent of Wisconsin's franchise tax on a proportionate share of Wrigley's sales; two other states which have specifically considered the question have determined that Wrigley's substantially equivalent

activities in those states are protected by 15 U.S.C. sec. 381, and thus that no tax may be imposed.

APPLICABLE LAW

Wisconsin's franchise tax is set forth in section 71.01(2), Stats., which provides, in material part, as follows:

> For the privilege of exercising its franchise or doing business in this state in a corporate capacity. . .every domestic or foreign corporation. . .shall annually pay a franchise tax according to or measured by its entire net income of the preceding income year. . . .

Because the Commerce Clause of the United States Constitution grants to Congress the exclusive power to regulate interstate commerce, no state has power to impose a direct tax upon the "privilege" of engaging in interstate commerce. *Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). The states may, however, consistent with that Clause, impose a tax on the net income generated by interstate commerce "'which is attributable to earnings within the taxing state,'" *Id.*, 358 U.S. at 462, quoting

Wisconsin v. Minnesota Min. & Mfg. Co., 311 U.S. 452, 453.

> [I]t is axiomatic that the founders did not intend to immunize such commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the State.

Id., at 461-62.

The fundamental requirements of the Due Process Clause must also be met before any state may exercise taxing jurisdiction over a taxpayer. The test is "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it may ask return." *Wisconsin v. J.C. Penney Co.*, 311 U.S. at 435, 444 (1940). In *Portland Cement, supra*, the United States Supreme Court held that the due process test was met by a tax imposed on that portion of net income which arose from the corporate taxpayer's activities within the state, which it described as "a regular and systematic course of solicitation of orders for the sale of its products, each order being

subject to acceptance, filling and delivery by it from its plant [in another state]." 358 U.S. at 454. Such activities, it held, "form a sufficient 'nexus between such a tax and transactions within a state for which the tax is an exaction.'" 358 U.S. at 464, quoting *J.C. Penney, supra*, 311 U.S. at 445.

Seven months following the Supreme Court's ruling in *Portland Cement, supra*, Congress enacted the federal statute at issue in this case, Public Law 86-272, governing the imposition of net income tax by states on income from interstate commerce. Codified as 15 U.S.C. sec. 381, the law provides in material part as follows:

Minimum Standards

> (a) No State. . .shall have power to impose. . .a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:
>
> (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

> (2) the solicitation of orders by such person, or his representative in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

The term "solicitation" is not defined in the statute. Nor was a substantive definition approached in the only United States Supreme Court case to have considered this legislation to date, *Heublein v. South Carolina Tax Commission*, 409 U.S. 275 (1972). Consequently, the legislation has spawned litigation at the state level focused on the same question presented by this case: whether the activities within the state of the interstate business whose net income is sought to be taxed fall within the protection of the statute.

ISSUE AND STANDARD OF REVIEW

On this review, the department states the issue as follows:

> Whether the Commission could reasonably have concluded that Wrigley had nexus in Wisconsin for franchise tax purposes because Wrigley engaged

> in more than the mere solicitation of orders for acceptance and shipment outside this state.

Consistent with this phrasing of the issue, the department cites its own administrative regulations governing "nexus" determinations, and several Wisconsin cases holding that reviewing courts must defer to agency interpretations of the laws it is charged with administering. It contends that because the agency has evinced its intention through these regulations to construe Wisconsin statutes broadly, so as to "afford the State of Wisconsin maximum statutory latitude to tax sales not covered by the federal statute," the reviewing court should extend its deference to the agency's approach by imposing, or confirming, a concomitantly narrow construction of the federal statute in question.

Wrigley contends that the sole issue presented by this case is whether the activities of its sales force during each of the years in question constitute solicitation of orders within the meaning of the federal statute, thus placing it outside the taxing jurisdiction of Wisconsin. It contends further that because this question is strictly a question of

federal law, no deference is due to a state agency's resolution of the question.

This court concludes that the interpretation of 15 U.S.C. sec. 381 is the dispositive, if not the only, issue of the case. Congress set forth in that statute what it termed "minimal standards" for the exercise of state jurisdiction to tax income derived in a state through interstate commerce. So long as the activities of a business are within the penumbra of protection afforded by the statute, these "minimal standards" are not met and the state has no *power* to tax, regardless whether "nexus," in the constitutional sense, exists.

Nexus considerations present a discrete, separate issue from the issue posed by this case; they are aimed at answering constitutional concerns arising out of the Due Process and Commerce Clauses, as to whether some "'minimal connection. . .between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise'" support the imposition of the

state's taxing jurisdiction. *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 165 (1983).

If immunity is lost by activities in excess of the category of activities protected by 15 U.S.C. sec. 381, then a nexus/minimal contact analysis of all of the business' activities in the state is appropriate and necessary to address the constitutional limitations on a state's power to tax income derived from interstate commerce. Until that determination is made, however, a nexus analysis is premature, and may serve to blur lines which must be kept distinct in order to resolve the purely statutory question which precedes it.

Whether Wrigley's activities in Wisconsin exceed the statutory immunity conferred by 15 U.S.C. sec. 381 is a question of statutory interpretation of that statute only, within the context of the facts of record. The department's suggestion that the intended application of that law is variable, depending on the breadth of local statutes and regulations in the various states in which it is interpreted, must be rejected. The question in interpreting any statute

is what the legislature, here Congress, intended. It is not reasonable to suppose that Congress, in the exercise of its plenary power to regulate interstate commerce, passed a law which it intended to be applied other than uniformly throughout the states.

> It is a familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. . . .When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176 (1942). *See also, Leo Feist v. Young*, 138 F.2d 972, 976 (7th Cir. 1943).

Both interpretation and application of statutes are questions of law, as to which courts are not generally bound by agency determinations. *West Bend Education Association v. Wisconsin Employment Relations Commission*, 121 Wis. 2d 1, 11, 357 N.W.2d 534 (1984); *NCR Corporation v. Department of Revenue*, 128 Wis. 2d 442, 447, 384 N.W. 2d 355 (1986). Although "due weight"

is to be "accorded the experience, technical competence, and specialized knowledge of the agency involved," sec. 227.57(10), Stats., the weight that is "due" is not "great" in all cases.

The cases cited by the department in support of its contention that the commission's interpretation of this federal statute is entitled to great weight on review, and that this court is bound to accept that interpretation if there is a rational basis for it,[5] do not deal with an agency's interpretation of federal law, much less with one proscribing this state's imposition of the very state laws the agency is charged with administering.

In *School District of Drummond v. Wisconsin Employment Relations Commission*, 121 Wis. 2d 126, 132-33, 358 N.W.2d 285 (1984) the Wisconsin Supreme Court stated:

> *When the legislature charges an administrative agency to apply and enforce a particular statute. . .*,the agency's construction and interpretation of the statute are entitled to great weight and any rational basis will sustain its practical interpretations. *Arrowhead United Teachers v. ERC*, 116 Wis. 2d 580, 593, 342

> N.W.2d 709 (1984); *Beloit Education Asso. v. WERC*, 73 Wis. 2d 43, 67, 242 N.W.2d 231 (1976). We have qualified this standard, though, by stating that where the question involved is one of first impression, the court will accord the agency's interpretation only due weight in determining the appropriate statutory construction, rather than the great weight-rational standard. *Berns v. Wis. Employment Relations Comm.*, 99 Wis. 2d 252, 261, 299 N.W.2d 248 (1980). The great weight-any rational basis standard applies in situations where the "'commission's interpretation reflects a practice or position "long continued, substantially uniform and without challenge by governmental authorities and courts."' *Id.*, citing *Wood County v. Bd. of Vocational, T. & A. Ed.*, 60 Wis. 2d 606, 618, 211 N.W.2d 617 (1973) *Arrowhead*, 116 Wis .2d at 594. [Italics supplied.]

Similarly, the supreme court has held that "while due due deference must be accorded an agency's application of the law to the found facts when the agency has particular competence or expertise in the matter at hand," no such deference is required when courts are as competent as the agency to decide the question presented. *Department of Revenue v. Milwaukee Refining Corp.*, 80 Wis. 2d 44, 48, 257 N.W.2d 855 (1977). *See also, Xerox Corp. v. Department of Revenue*, 114 Wis. 2d 522, 526, 339 N.W.2d 357 (1983).

This case presents an issue of first impression in Wisconsin courts. It involves the meaning of a federal statute which expressly prohibits states from asserting tax jurisdiction, or administering local taxing authority, over a business whose "only" activities in the state fall within a specified category. Even if the commission's expertise in determining Wisconsin's jurisdiction in this type of case were assumed, no such expertise was demonstrated in this case.

In rendering its decision, the commission did not purport to examine the rationale of the statute itself, its legislative history, or the cases from other states which have construed it in a variety of circumstances. Instead, the commission analyzed the facts of this case against the standard of the agency's "nexus" regulations promulgated in 1979, the year following the last tax year at issue in this case,[6] and certain guidelines for the application of 15 U.S.C. sec. 381 set forth in a resolution of the Multistate Tax Commission (MTC) passed in 1985.[7] The MTC is an organization of state tax revenue agents which

has formally proposed the repeal of 15 U.S.C. sec. 381. *All States Tax Guide* (P-H) sec. 694-B. Although its resolution was not cited by either party in the briefs submitted to the commission, the commission summarily "adopted" the guidelines wholesale in its original decision in this case, and stated that their application to the facts of the case "compelled" it "to conclude that Wrigley did indeed cross the line and lost the protection afforded" by the federal law.[8]

Following remand from the original review of this case in Dane County Circuit Court, and despite the articulate dissent of one of its members questioning how regulations and guidelines promulgated one and seven years, respectively, after the last tax year at issue in the case could be applicable to its resolution, the majority of the commission "affirmed" its original decision and order without considering the retroactive implications of its action.[9] Neither did it consider the propriety of adopting the "informational" guidelines of a professional association

of revenue agents and applying them to the facts of this case as though they were the substantive law of Wisconsin.

Although the commission cited two cases from other jurisdictions as supportive of its determination, it did not discuss the reasoning of those cases or of any of the other applicable caselaw, which had been cited in the parties' briefs to the commission, in reaching its conclusion that "the considerable activities of Wrigley" during 1973 through 1978 "transcended the solicitation of orders protected by P.L. 86-272 [15 U.S.C. sec. 381] irregardless of whether the DOR or Wrigley had the burden of proof to show it."

This court concludes that the commission's determinations of law in this case neither constitute nor incorporate an interpretation of 15 U.S.C. sec. 381 to which this court must, or should, give special deference.[10]

Similarly, no deference is due to the commission's ultimate findings of fact in this case. The historical, evidentiary facts of record are undisputed, having been adduced solely from the non-conflicting testimony of

Wrigley's witnesses, whom the commission found to be credible. These facts do not give rise to conflicting inferences; it is, rather, their legal significance under the federal statute which is in conflict. In determining their legal significance, the commission did not look to the statute. Instead, it adopted the MTC guidelines, and stated that the application of these guidelines "compelled" it to conclude that Wrigley lost the protection of the statute by engaging in ten specific "non-immune" activities "during the years 1973-1978 in the state of Wisconsin," which it listed as follows:

1. replacement of stale gum
2. maintaining product displays both as to location design and content
3. direct sales of gum by use of "agency stock checks"
4. maintaining offices in home
5. conducting regular and periodic training seminars in Wisconsin
6. recommending hiring, firing and raises of sales representatives in Wisconsin by regional manager
7. involvement in credit transactions by regional manager
8. training and supervising sales representatives by regional sales manager
9. rental of storage space in Madison, Wisconsin
10. the purchase of non-incidental advertising in Wisconsin

The commission's sole discussion of these activities in its original opinion is the following paragraph:

> A perusal of the position description of the Regional Manager is helpful. Although increasing sales volume was obviously the primary goal of all of Wrigley's employees in Wisconsin, the regional manager also performed other important managerial and supervisory functions, all within the confines of the State. One of his listed principal activities was to "represent the company on credit problems as necessary". Although petitioner attempted to minimize this responsibility at the hearing before this Commission, its regional manager testified that "a couple, three times a year" he mediated credit problems between a very good account and his credit department in Chicago. This alone clearly exceeds the "solicitation of orders."

In its decision following remand from the initial circuit court review, in apparent response to Judge Nowakowski's observation that only one of the two regional sales managers testified as to any kind of involvement in credit transactions during 1973-1975, and that "analysis of Wrigley's activities for qualification for the immunity of 15 U.S.C. sec. 381 must. . .be done on an annual basis,"[11]

the commission made the following clarification to its original language:

> Although the company job descriptions of both [Regional Managers] Hecht and Kroyer called for them to participate in credit transactions, it is clear and uncontroverted from their testimony that Gary Hecht, regional manager from 1976 to 1978, had no involvement of any kind in credit transactions with Wrigley customers while John Kroyer, regional manager from 1973 to 1975, did.
>
> . . . .
>
> Although the credit transaction was highlighted in its Opinion, this Commission did not rest its decision on that basis alone but rather relied on the totality of all the different non-immune activities specified at page 25 of its Opinion, including the credit activities in 1973 to 1975 as well as the maintaining [of] home offices and conducting regular and periodic training seminars in Wisconsin, which findings were based on the unimpeached, credible testimony of petitioner's own witnesses which are supported by the record.

This court has carefully examined the record. Although the commission's clarified finding with respect to "involvement in credit transactions" is supported by the evidence, there is no evidence in the record whatever that "regular and periodic training seminars" were conducted in Wisconsin. It is undisputed that all training of new recruits

took place on-the-job, in the field, during the course of actual solicitations of customers. It is undisputed that only occasional meetings were held at which sales strategy was discussed, particularly when new Wrigley products were introduced. There is also no evidence that Wrigley maintained, authorized, approved, or knew of any offices in the homes of its Wisconsin employees. The only evidence on this point is that a single employee, regional manager Kroyer, had a company-issued file cabinet in the corner of his basement where he kept Wrigley personnel files and supplies during 1973-75, that he took a tax deduction for this floor space, and that he received no reimbursement from Wrigley for the use of this space.[12] Even if the substantial evidence test applied, these particular findings, upon which the commission seemed to place special emphasis, would have to be qualified or set aside as unsupported by the substantial evidence.

Similarly, the commission's reliance on "rental of storage space" in Wisconsin as an activity forfeiting immunity ignores the fact that the only such space was

rented not by Wrigley, but by a single employee who had no alternative space available to store supplies essential to his solicitation of accounts, and as an exception to company policy. Its reliance on "the purchase of non-incidental advertising in Wisconsin" both ignores the fact that all advertising was purchased from outside the state and appends the unexplained legal conclusion that this advertising was "non-incidental" to solicitation of orders.[13] Its reliance on "direct sales of gum by use of 'agency stock checks'" also imposes a questionable legal interpretation on an infrequent type of transaction which never, according to the undisputed testimony of Wrigley's witnesses, involved the payment of money or other consideration to the salesman nor the negotiation of price--both of which were matters handled through Chicago.

Where the material facts are not in dispute, and the question is the legal significance of those facts under the applicable rule of law, the question is one of law, *Nottelson v. ILHR Department*, 94 Wis. 2d 106, 115-16, 287 N.W.2d 763, 768 (1980), and the reviewing court owes no special

deference to the agency's determination. *Wisconsin Bingo Supply & Equipment Co. v. Wisconsin Bingo Contorl Board*, 88 Wis.2d 293, 308, 276 N.W.2d 716 (1979); *Frito-Lay, Inc. v. Labor & Industry Review Commission*, 95 Wis. 2d 395, 400, 290 N.W.2d 551 (Ct. App. 1980). Where only one reasonable inference may be drawn from the evidence, the drawing of that inference is a question of law. *Vocation, Tech. & Adult Ed. Dist. 13 v. ILHR Dept.*, 76 Wis. 2d 230, 240, 251 N.W.2d 41, 46 (1977). Where the question is one of mixed law and fact, that portion of an agency's determination which constitutes tHe assignment of legal meaning to facts is one of law. *Wisconsin Dept. of Revenue v. Exxon Corp.*, 90 Wis. 2d 700, 713, 281 N.W.2d 94, 101 (1979), aff'd, 447 &.W. 207 (1980).

The evidence being undisputed in this case, and the commission having found that the testimony presented by Wrigley's witnesses was credible, the dispositive question for review is one of law: Whether one or more of Wrigley's activities in Wisconsin, viewed separately or in their totality, exceeded the activity Congress sought to protect

from tax consequences when it enacted 15 U.S.C. sec. 318. Because this court concludes that the protection of the federal statute was not forfeited by Wrigley's activities, and thus that Wisconsin "was prohibited from imposing the tax in question, it is unnecessary to reach the department's contention that interest should have been assessed at a higher rate than that allowed by the commission.

DISCUSSION

Because Congress did not define "solicitation" in 15 U.S.C. sec. 381, and has offered no other guidance for ascertaining the breadth of the activity it intended to protect when it enacted the statute in 1959, the question has been presented in a variety of contexts to state courts throughout the nation. The United States Supreme Court has repeatedly refused to review both cases finding immunity under the statute, and those holding that immunity has been forfeited by acts in excess of solicitation.[14] In the only case to consider the statute to

date, *Hublein v. South Carolina Tax Commission*, 409 U.S. 275, 279-280 (1972), that Court stated:

> The impetus behind the enactment of sec. 381 was this Court's opinion in Northwestern States Portland Cement Co. v. Minnesota, 358 US 450, 3 L Ed 2d 421, 79 S Ct 357, 67 ALR2d 1292 (1959). There we held that "net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same." 358 US, at 452, 3 L Ed 2d 421. Congress promptly responded to the "considerable concern and uncertainty" and the "serious apprehension in the commercial community" generated by this decision by enacting Pub L 86-272, 73 Stat 555, 15 USC sec 381, within seven months.
>
> In this statute, Congress attempted to allay the apprehension of businessmen that "mere solicitation" would subject them to state taxation. Such apprehension arose because, as businessmen who sought relief from Congress viewed the situation, Northwestern States Portland Cement and not adequately specify what local activities were enough to create a "sufficient nexus" for the exercise of the State's power to tax. Section 381 was designed to define clearly a lower limit for the exercise of that power. Clarity that would remove uncertainty was Congress' primary goal. By establishing such a limit, Congress did of course implicitly determine that the State's interest in taxing business activities below that limit was weaker than the national interest in promoting an open economy.

Heublein did not address the scope of sec. 318, holding that the statute did not apply to a liquor manufacturer and distributor which was required, by state liquor regulatory provisions the Court held to be lawful, to disqualify itself from the statute's protection by transferring its products within the state rather than delivering them "from a point outside the state" as sec. 318 specifies. "We need not decide," the Court said, "whether. . .the actions of Heublein's representative in maintaining a local office, meeting with retailers, distributing promotional literature, and personally delivering some orders to the wholesaler, do not fall within the term 'solicitation.'" 409 U.S. at 278.

Such business activities and others have been scrutinized by state courts in cases dealing with a given business' claim of immunity under 15 U.S.C. sec. 381 from that state's taxes, and also in the so-called "reverse-nexus" cases, in which the question is whether business activities in another state render it subject to taxation there, so as to entitle the business to allocate a portion of its income otherwise taxable in this state to a

foreign taxing jurisdiction. *See, eg., Miles Laboratories, Inc. v. Department of Revenue*, 546 P.2d 1081 (Or. 1976); *Coors Porcelain Company v. State*, 517 P.2d 838 (Colo. 1974); *Cal-Roof Wholesale, Inc. v. State Tax Commission*, 410 P. 2d 233 (Or. 1966).

Regardless whether a state is asserting tax jurisdiction over a foreign corporation on grounds that its local activities exceed the protection of 15 U.S.C. sec. 381, or is contesting the allocation of income to a foreign jurisdiction on grounds that the business' activities in that state are "mere solicitation" and thus immune, the issue of law that must be resolved is the same: are the activities in question "mere solicitation" within the meaning of the federal statute, or are they something more?[15] Nowhere is this question more difficult to resolve than in a case, as here, where the business operates through a sophisticated sales force, including domestic field representatives, to promote a continuous and increasing flow of new and repeat orders for its products in a competitive multi-state market. State courts have taken various approaches to resolving the

question, which one court has described as falling within a range viewing "solicitation," at its narrowest, as "the specific act of asking a customer to purchase one's product," to a middle ground including "any act which leads to the purchase of one's product," to a broad conception including "any act which leads to or follows from the purchase so long as said act is incidental to the purchase." *Chattanooga Glass Co. v. Strickland*, 261 S.E.2d 599, 600-601 (Ga. 1979).

The state of Oregon has had a substantial share of the cases applying 15 U.S.C. sec. 381, and has employed both broad and narrow interpretations. In *Smith Kline & French Laboratories v. State Tax Com'n*, 403 P.2d 375 (Or. 1965), one of the first cases to apply the federal statute, the Oregon Supreme Court rejected a strict, act-of-solicitation-only construction in a case where pharmaceutical salesmen did not directly solicit orders, but rather promoted the use of the company's products by explaining their usefulness and encouraging doctors to prescribe and druggists to stock them. Referring to several

congressional committee reports published concurrently with the enactment of 15 U.S.C. sec. 381, the court (adopting the language of the tax court) concluded:

> "These reports show that Congress intended to exempt not only the specifically described phase of interstate sales efforts but also all lesser, included phases.
>
> Furthermore, the nature of plaintiff's business makes its activities in Oregon the equivalent of solicitation of orders in other, less technical businesses. . . .A realistic legal and factual interpretation of P.L. 86-272 requires exemption of plaintiff from Oregon corporation income tax." 403 P.2d at 377-78.

The following year, in *Cal-Roof Wholesale, Inc. v. State Tax Commission*, 410 P.2d 233, at 239 (Or. 1966), the same court held in a reverse nexus case that an Oregon building materials corporation was entitled to an apportionment of its net income between Oregon and Washington because "its Washington activities clearly encompassed more than 'solicitation' only." These additional activities, through a single Washington salesman, included collection of delinquent accounts "on numerous occasions," pick-ups of returned merchandise from customers, occasionally giving spot credit and accepting orders, and customarily carrying

a supply of small items which he sold and delivered in Washington. In subsequent holdings, the Oregon court added the collection of deposits and advances on orders,[16] and the pooling and exchanging of technical personnel "in a complex mutual endeavor"[17] to its list of "nonimmune" activities. In *Olympia Brewing Co. v. Department of Revenue*, 511 P.2d 837 (Or. 1973), cert. den. 415 U.S. 976 (1974) the court affirmed per curiam the tax court's determination that a multi-state beer seller had exceeded the protection of 15 U.S.C. sec. 381 by maintaining beer kegs used to dispense Olympia draft beer in Oregon retail establishments, while declining to express an opinion as to tax court's conclusion that the corporation's other activities--including the field representatives' regular inspection of retail inventories to determine potential shortages, and their efforts to obtain maximum displays at each retail outlet--constituted mere solicitation.

It is against this background that the Oregon court decided *Miles Laboratories, Inc. v. Department of Revenue*, 546 P.2d 1081 (Or. 1976), one of the two court cases cited

by the commission in support of its decision in this case. *Miles* was a "reverse nexus" case in which a pharmaceutical corporation concededly taxable in Oregon, where one of its distribution warehouses was located, sought to exclude a portion of its net income otherwise taxable in that state on grounds that it was attributable to non-immune business activities in the adjoining state of Washington.[18]

The stipulated facts in *Miles* were skeletal. Like Wrigley, Miles sold its products through a nationwide system involving a central headquarters which approved all orders, distribution warehouses in several states (including Oregon), and salespeople assigned to solicit orders in specific sales territories. Unlike Wrigley, it was licensed to do business and paid taxes in the state whose jurisdiction to tax was at issue (Washington), and maintained a registered agent there. It was stipulated that Miles' twelve Washington salesmen routinely replaced damaged goods from their supply of samples, and arranged appropriate displays of Miles' products in retail facilities.

The supreme court said that in *Olympia Brewing, supra*, it had adopted the following "reasoning of the Tax Court, which stated:

> '. . ."solicitation" should be limited to those generally accepted or customary acts in the industry which lead to the placing of orders, not those which follow as a natural result of the transaction, such as collections, servicing complaints, technical assistance and training. . . .' *Olympia Brewing Co. v. Dept. of Rev.*, 5 OTR 99, 110 (1972)." *Miles, supra*, 546 P.2d at 1083.

The supreme court concluded without further discussion that Miles' activities in Washington exceeded solicitation, thus rendering it subject to taxation in that state and entitling it to allocate its income for Oregon tax purposes. 546 P.2d at 1083. The supreme court did not point out that the quoted reasoning of the *Olympia* tax court upon which it relied had led the tax court to conclude that Olympia's regular inspection of inventories and its work on advertising displays amounted to no more than solicitation, and was thus protected by the statute. It is not clear from the court's opinion what weight, if any, the fact that Miles

was licensed to do business in Washington and paid taxes there may have had in its conclusion.

The only other case cited by the commission as supporting its decision in this case is *Drackett Products Co. v. Conrad*, 370 N.W.2d 723 (N.D. 1985). The case involved an Ohio corporation which sold household products through a single salesman in North Dakota. In addition to soliciting orders, the salesman replaced damaged merchandise with products he carried in his car for that purpose, checked product inventory, checked retail prices to determine whether they were competitive and occasionally asked retailers to reduce prices to a competitive level, traced late shipments, sold aisle displays developed by Drackett and installed them, and monitored shelf placement of products. The court noted an opposing line of cases, but relied on *Miles, supra*, among others as establishing the following "general rationale":

> [A] business exceeds the mere 'solicitation of orders' for purposes of tax exemption under 15 U.S.C. sec. 381 if its activities go *beyond acts necessary for and leading to the placing of orders*. Following that rationale, we conclude that if an

> out-of-state business engages, within this State, in *other ongoing activities which are commonly associated with maintaining a business operation*, it s not exempt from North Dakota taxation under 15 U.S.C. sec. 381. However, by performing such activities in isolated instances the business does not necessarily exceed solicitation nor lose the tax exempt status under that provision. 370 N.W.2d at 726. (Italics added.)

The only other case cited by the department in support of the commission's decision, which is arguably on point with this case is *Clairol, Inc. v. Kingsley*, 262 A.2d 213, aff'd. 270 A.2d 702 (N.J. 1970), app. dism. 402 U.S 402 (1971). Like Wrigley, Clairol is a nationwide business operating through a hierarchical sales structure. Its "detailmen," similar to Wrigley's field representatives, regularly visited retail establishments where Clairol products were sold. Their "primary function" was "to promote the public's purchase and use" of Clairol products. 202 A.2d at 217. Toward that end, detailmen set up and rearranged displays of products in the retail establishment, took inventories, prepared suggested orders, and used product samples to reward retail personnel and promote good will. Unlike Wrigley, Clairol also utilized trained

technicians who visited beauty salons not to take orders, but to demonstrate the product and teach new techniques. *Id.* The appellate court, whose opinion was affirmed summarily by the New Jersey Supreme Court, 270 A.2d 702, concluded:

> It is thus evident that Clairol's business activities in New Jersey extend beyond the mere solicitation of orders on its own behalf or on behalf of its wholesalers.
>
> That increased public favor of Clairol's products will eventually result in increased orders from retail druggists to wholesalers and from wholesalers to Clairol, or as in the case of its hair products from beauty salons to "beauty jobbers" and from the latter to Clairol, does not blanket all Clairol's activities with the protection afforded by the federal act to cases where the only business activity of the taxpayer is the solicitation of orders. 262 A.2d at 217-18.

Wrigley's sales structure had no counterpart to Clairol's technicians; no Wrigley representative had contact with the ultimate consumer of Wrigley products, or any type of "training" function.

None of these three cases, nor the other cases less closely on point relied on by the department for their "strict construction" of 15 U.S.C. sec. 381,[19] contain more

than a cursory discussion of the legislative history of the statute. Wrigley relies on several cases in addition to *Smith Kline & French Laboratories, supra*, each of which is directly on point with the facts of this case, involving a hierarchical sales structure through which the business in question had a continuous presence in the state attempting to impose a tax.

In *Gillette Co. v. State Tax Comm'n*, 393 N.Y.S.2d 186 (App. Div. 1977), aff'd, 382 N.E.2d 764 (N.Y. 1978), the state tax commission argued that the local sales representatives' practice of advising retailers on display techniques, in order to make products more attractive to the ultimate consumers, was a post-sale merchandising activity which exceeded the bounds of "solicitation" under 15 U.S.C. sec. 381. The court rejected this argument in light of the legislative history of the statute, stating:

> [A]lthough it is not possible to state a general rule demarcating solicitation from merchandising, certainly where, as here, the complaining taxpayer owns no real or personal property (except salesmen's samples) in the State and makes no repairs on its goods after sale, the purpose of P.L. 86-272 would be frustrated by permitting the tax.

> Advice to retailers on the act of displaying goods to the public can hardly be more thoroughly solicitation, i.e., in this context, an effort to induce purchase of Gillette products. Making the evanescent distinctions which would be necessary to justify the imposition of the tax upon petitioner herein would, if indulged in by the several states, tend to 'Balkanize the American economy', a result which it was Congress's purpose to prevent. 393 N.Y.S. at 191.

In *United States Tobacco Co. v. Com.*, 386 A.2d 471 (Pa. 1978) cert. den. 439 U.S. 880 (1978), the corporation's sales representatives checked inventories for freshness of product, as well as for attractiveness of display and potential shortage of supply. They also set up counter displays, gave retailers free samples of products in exchange for more extensive counter space, and made direct sales of samples to retailers at wholesale prices, accepting direct payment on these no-profit, "incidental sales." 386 A.2d at 472. In concluding that these activities were within the protection of the statute, the Pennsylvania Supreme Court extensively reviewed both its legislative history and the several lines of cases construing the statute in other jurisdictions. It viewed as particularly significant

the Senate Report in support of sec. 381, which stated that the apprehension caused in the business holding in *Portland Cement, supra*, was "apparently strengthened" by that court's refusal to review *Brown-Forman Distillers Corp. v. Collector of Revenue*, 101 SO.2d 70 (1958), cert. den. 359 U.S. 28 (1959). The court said:

> In *Brown-Forman*, the foreign corporation's "missionary men," like appellant's representatives, not only sought to procure initial orders for the company's products, but also were involved in obtaining optimum counter displays for those products. . . .When Congress enacts legislation exempting "solicitation" by an interstate corporation from a state's net income tax, and does so in response to a case where the "solicitation" involved activities incidental to the initial contact between seller and prospective buyer, we as state courts are bound to give foreign corporations sec. 381 immunity even though their representatives engage in activities incidental to the initial contact between buyer and seller. The question is one of degree. The foregoing analysis, however, constrains us to disagree with those courts which have concluded that Congress intended "solicitation to be narrowly construed. 386 A.2d at 478; citations omitted.

In light of this history, the Pennsylvania court concluded that such activities as advising retailers on attractive displays are "inextricably related to solicitation"

and were precisely envisioned by subsection (2) of sec. 381(a) which immunizes solicitation "for the benefit of a prospective customer." 386 A.2d at 478. Where the sales activities constitute "an effort to generate sales at the retail level" so that direct customers (wholesalers) will order more products to satisfy retail demand, it would defeat the purpose of the act to deny coverage on the basis of "evanescent distinctions between 'solicitation' and 'solicitation plus' or 'merchandising.'" *Id.*

In *Indiana Dept. of Revenue v. Kimberly-Clark Corp.*, 416 N.E.2d 1264 (Ind. 1981), the Indiana Supreme Court followed *Gillette* and *U.S. Tobacco* in holding that a Wisconsin corporation's activities in that state did not exceed solicitation. These activities, by the equivalent of Wrigley's field representatives, included such "missionary work" at retail facilities as setting up displays, checking inventories, pricing and shelving products when requested, and "work[ing] from. . .home" with, in some cases, company-supplied portable typewriters, staple guns, and the like. 382 S.W.2d at 652. Like Wrigley,

Kimberly-Clark hired a Chicago agency to handle all media advertising in Indiana. *Id.* Noting that "[n]o one or two corporate activities performed in a casual or infrequent manner should operate to remove" the protection of the federal statute, the court held:

> We also believe that Congress perceived "solicitation" as embodying "sundry activities so long as those activities [are] closely related to the eventual sale of a product.". . .Finally, when a corporate representative performs an "act of courtesy" in order to accommodate a customer, he has not ventured beyond the realm of "solicitation.". . .
>
> The aforementioned activities of the petitioner in this case may be properly categorized as "inextricably related to solicitation," or as "acts of courtesy." As such, the exemption provided by Public Law 86-272 is applicable. 416 N.E.2d at 1268.

Accord, on different reasoning, *Coors Porcelain Company v. State*, 517 P.2d 838 (Colo. 1973), cert. den. 419 U.S. 874 (1978)[20] and *State ex rel. Ciba Pharmaceutical Products, Inc. v. State Tax Commission*, 382 S.W.2d 645 (Mo. 1964).[21]

In this court's opinion, the weight of both law and logic favor Wrigley's contention in this case that its activities in

Wisconsin during the years in question did not exceed the intended protection of 15 U.S.C. sec. 381. These activities are distinguishable from those held to have "crossed the line" in *Miles, Drackett*, and *Clairol*, even if the reasoning of those cases is accepted; they are also well within the limits discerned by those courts who have informed their understanding of the scope of the statute by considering its legislative history. Wrigley's enterprise in this state was solicitation of orders for its products, and no other. Each of the activities focused on by the commission was either inextricably related to that enterprise, or was so isolated an exception to common practice that it should not be viewed as forfeiting the protection of the statute.

No authority has been cited, and none has been found, to support the notion that advertising products for sale in national or local media is an activity exceeding "solicitation." The advertising activities of Miles, Clairol, and Drackett were not even mentioned as a factor for consideration in the immunity determinations made by the cases primarily relied upon by the commission, even

though such advertising was of major scope in two of those cases.[22] The commission's opinion does not discuss the significance of the advertising its findings describe in this case, nor does it offer any reason in that opinion or in this review proceeding for depicting the same as "non-incidental" to Wrigley's solicitation activities as that term is employed by the MTC guidelines the commission consulted. The commission made no change in its opinion after remand, despite the conclusion of one of its members in a dissenting opinion issued with the Decision and Order on Remand that advertising itself is a form of solicitation protected by 15 U.S.C. sec. 381.[23] It did not mention the fact that all Wrigley advertising appearing in Wisconsin was purchased through an out-of-state agency.

Although the nature and extent of a corporation's advertising within a state may have a bearing on determining whether it has "nexus" with that state for constitutional purposes, nexus is not the question in this case. The question is whether Congress, by prohibiting the imposition of state tax on businesses whose only contact

with the state is "solicitation," intended that the protection thus conferred would be lost by any business engaging in national or multistate advertising. There is no suggestion in the legislative history, nor any authority, for the proposition that it did; there is obvious reason to believe that it did not. It therefore follows that whether such advertising is viewed as being itself a form of solicitation, or as an activity inherently related to solicitation, it is immune from forming the basis for state taxing jurisdiction under 15 U.S.C. sec. 381.

Although several cases cited by the parties note that sales representatives "worked out of their homes" or maintained "home offices," and that they attended sales meetings within the state whose jurisdiction to tax was at issue, no court has held that such practices or activities were even relevant to the question of immunity under 15 U.S.C. sec. 381.[24] Congress did not limit the reach of this statute to only those solicitors who travel into the state from points outside it,[25] nor to those companies who

employ only one sales representative in each state in which it solicits.

Sales representatives must live somewhere, and if they live in the state where they solicit, it naturally follows that they will keep their samples, supplies, records, and other tools of their trade within convenient reach. In the absence of a company office--and it is undisputed that Wrigley had none in Wisconsin--sales representatives may be expected to keep the materials related to their employment in their homes or cars, or to acquire another suitable place to store them, as Wrigley's representatives did in this case. If they are organized people, they will probably keep those items in a discrete number of locations within their homes, especially if paperwork is a part of their job responsibility. And because they have interests in common, including the interest of serving their employer within a given geographical area, they will probably meet from time to time within that area, and they will probably talk business when they do.

As the Philadelphia Supreme Court said with respect to the universal phenomenon of the "company car" furnished to sales representatives who travel their territories, "Congress could hardly have intended to exempt only walking solicitors." *United States Tobacco v. Com.*, 380 A.2d 471, 478, cert. den. 439 U.S. 880 (1978). The same point may be made with respect to "home offices" and sporadic sales meetings of the sort described in this record. Congress could hardly have intended to exempt only salespeople who had no equipment and records to house, no paperwork to perform, and nothing to say to one another. It would defeat the purpose of the statute if state tax officials were allowed to elevate corners of basements (with or without a company-owned filing cabinet) and kitchen tables into corporate offices, or to treat occasional sales gatherings as an occasion for asserting state jurisdiction.[26]

This court views as immaterial the fact that a single sales manager took a tax deduction for his "home office" during some of the years in question, and the fact that

Wrigley chose to reimburse another employee for the cost of obtaining storage for his supplies in his own name, and the fact that some annual gatherings of sales representatives were held in a sales manager's home while other meetings may have been held in Wisconsin motels.[27] Whether or not the expenses associated with these practices are viewed as "business expenses" for tax or reimbursement purposes, the purpose of the business being conducted thereby was that of soliciting orders for products in another state, and that is within the protection of the statute.

Although the "involvement in credit transactions" of a single sales manager "a couple, three times a year" during three of the six years in question approaches a line drawn by some cases, and might properly, if routinely practiced, be viewed as exceeding it, the activity described in this record does not do so. Mr. Kroyer made no collections, a practice held to be non-immune in *Cal-Roof Wholesale, Inc. v. State Tax Commission*, 410 P.2d 233 (Or. 1966). Nor did he, so far as the record shows, pressure customers

for payment of overdue accounts, a practice noted by the state tax agency in *Clairol, supra*, 270 A.2d 702 at 703, but not discussed in the court's opinion, 262 A.2d 213.

By his own testimony, Kroyer mediated between the company and a particularly good continuing account on rare occasions when a dispute "got rather nasty." His sole purpose for doing so was not collection, but the preservation of future solicitations and orders. Even under the "strict construction" of the statute followed in *Drackett, supra*, 370 N.W.2d 723, at 726, pursuant to which a line is drawn between solicitation and "maintaining a business operation," a business "does not necessarily exceed solicitation nor lose the tax exempt status" under sec. 381 "by performing such [maintenance] activities in isolated instances." *Id.* There is no suggestion in the record that Mr. Kroyer's "credit involvement" was other than rare, or for purposes other than continuous solicitation. It should be viewed, therefore, as no more than an "act of courtesy" insufficient to forfeit the statutory immunity. *U.S. Tobacco*

v. Com., supra, 386 A.2d at 478, cert. den. 439 U.S. 880 (1978).

No court has held that a sale manager's acts of recruiting, training, and supervising, or of recommending hiring, firing, and remuneration for sales representatives within a hierarchical sales structure such as Wrigley's, are acts in excess of "solicitation." The commission's sole pertinent citation in its opinion was to its own decision in *Avon Products, Inc. v. Wisconsin Department of Revenue*, Wis. Tax Rptr. [CCH] p. 202-710 (1986).

Avon is not on point. Unlike Wrigley's sales managers, who spent between 80 and 95 percent of their time in the field, soliciting, Avon's 35 to 60 Wisconsin managers spent *all* their working time recruiting, supervising, managing, and attending meetings. In addition, Avon's sales representatives ("Avon ladies") performed such non-immune acts as routinely delivering products and (apparently) collecting payments for the orders they solicited. No such acts by Wrigley enhance the conclusion

that its presence in Wisconsin is for a purpose broader than the solicitation of orders.[28]

Congress certainly knew when it enacted 15 U.S.C. sec. 381 that many multi-state businesses have large sales forces and hierarchical systems of management such as Wrigley's. Keeping track of those forces in their geographical areas, and maintaining control "through the ranks," is an inherent part of the efficient operation of such systems, whose whole reason for being is the solicitation of orders for products in another state. It makes no sense to believe that Congress intended to confer the solicitation immunity on multi-state businesses but to withhold immunity for the activities necessarily incident to the efficient practice of soliciting orders in fields remote from headquarters.

Wrigley's activities of replacing stale gum, maintaining product displays, and stocking those displays on occasion from sales representatives' supplies are all linked by the nature of Wrigley's market. The record is replete with information concerning the "impulse" nature of this

market, as shown by Wrigley's commissioned studies and by the experience of its sales personnel.[29] The appearance and location of product displays in retail establishments is central to moving the product to the ultimate consumer. An attractive, strategically-placed display can significantly increase impulse sales at the retail level,[30] thus increasing orders from wholesalers; fresh products sustain repeat trade by impulse buyers, who comprise over 90 percent of the market. Increased trade at the retail level means more orders from Wrigley, through its wholesalers.

Like its media advertising, and like the "promotional activities" of the pharmaceutical salesmen in *Smith-Kline, supra*, 403 P.2d 375, 377, Wrigley's activities in enhancing retail displays of its products and ensuring the freshness of products offered at retail may be viewed as a form of solicitation of the ultimate consumer, and thus as one of the "lesser, included phases" of interstate sales efforts which Congress intended to include in the protection conferred by 15 U.S.C. sec. 381. *Id.*

Although the *Miles* court viewed the similar actions of pharmaceutical salesmen as one which *followed* solicitation, and thus was not immune, it also adopted a definition of "solicitation" as "those generally accepted or customary acts in the industry which *lead to* the placing of orders." 546 P.2d at 1083; italics added. Wrigley employees testified that their activities were the same as those practiced generally in the chewing gum industry. And it is not merely the hope, but the experience of this industry, that these activities do, indeed, lead to the placing of more orders. Under the definition adopted by *Miles*, and under the reasoning of the courts in *Gillette, U.S. Tobacco*, and *Kimberly-Clark*, the display activities of Wrigley's salesmen are "solicitation" within the meaning of the statute, or are so "inextricably connected to solicitation" as to amount to the same thing. In either case, the activities do not forfeit the immunity of the federal statute.

U.S. Tobacco specifically approved the replacement of stale product, and occasional sales of supplies at wholesale prices by sales representatives who accepted payment for

the products. The "agency stock check" transactions at issue in this case are not "sales" in this sense; they do not involve the exchange of consideration, or an agreement as to price, which is fixed by Chicago headquarters and exacted by the wholesaler through normal billing routes. Unlike the purpose of the sales in *U.S. Tobacco*, which was to promote good will, *Id.*, Wrigley's purpose in making these transfers was to promote orders for its products by attractive stocking of displays.

Finally, even if these transactions were viewed as sales, they are infrequent exceptions to Wrigley's general practice and of *de minimis* value compared to its total revenues. Dissenting Commissioner Bartley computed the value of 1978 "agency stock check transfers" at 7/100,000 of one per cent of Wrigley's 4,392,202 Wisconsin sales during the last tax year in question. (Decision and Order on Remand, p. 16.) *Compare*, the dissent in *U.S. Tobacco, supra*, 386 A.2d at 480, which calculated that about five percent of that company's retail distributions in Pennsylvania were made directly by is sales

representatives. Both "strict" and "broad" constructionists of 15 U.S.C. sec. 381 agree that casual and infrequent, irregular, or exceptional activities do not forfeit the protection of the statute even if they do not fall within its terms.[30]

CONCLUSION

For all the reasons stated above, this court concludes that by reason of the operation of 15 U.S.C. sec. 381, Wisconsin was without power to impose a tax upon Wrigley's net income during the years in question. The commission's determination must therefore be reversed, and the case remanded for proceedings not inconsistent with this opinion.

Dated this 19th day of October, 1988.

BY THE COURT:

/s/ Martha J. Bablitch
Reserve Judge for
Dane County Circuit Court
Branches 3 and 8

APPENDIX

(1) The assessment at issue in this case was made prior to the amendment of sec. 71.09(5)(a) by L. 1981, Ch. 20, sec. 1090n., which made a 12 percent interest rate applicable to all nondelinquent taxes assessed on or after August 1, 1981. Under the applicable prior versions of the statute, the nondelinquent rate was six percent for the years 1973 and 1974 and nine percent for 1975 through 1978.

(2) In some states Wrigley also has agents called "key account managers," who solicit orders from the largest companies in their geographical regions. Together, these "key account' customers comprise the 20 percent of Wrigley's customers whose orders provide 80 percent of Wrigley's sales volume. There was no such agent in Wisconsin, however, in the years in question; these accounts were solicited primarily by the regional sales managers.

(3) Richard Radosevic, who served as a field representative in Wisconsin during the last half of 1978, testified as follows:

Q Well, did you ever stock new stands from your vehicle?

A I would say possibly on some--on a few occasions.

. . . .

Q And just what would--what all happened in that circumstance that you wound up putting in a new stand and taking the gum out of your vehicle and transferring it to the retailer?

A Well, like I said, primarily I wanted to get a stand in and then he wanted to get that order through his wholesaler; but if he couldn't wait, if he said my wholesaler was just in yesterday or something or he was not going to be in for a week, he didn't want a stand sitting around, so we would then fill it and then bill the wholesaler. That paperwork would go into Chicago. They would bill the wholesaler. The wholesaler would then bill that particular account.

Q And what kind of paper did you send to Chicago in that instance? What was it called?

A It was called an agency stock check.

Q Agency stock check. Was that a printed form prepared by Wrigley?

A Yes.

Q And what information was contained on it?

A Simply listed the name of the accounts or, you know, the name of the account you were putting the merch..ndise through, your name, your territory number, a complete list of all of your items and the hundred stick box equivalent.

(Tr., 8/26/85, pp. 88-89)

*****

Q Did you stock that display stand or utilize stock from your car in filling that display stand on a daily basis?

A No, I did not.

Q Where did the stock which was ultimately utilized to fill that display stand come from?

A The majority of the time it came from the store. In fact, you know, on many times when we placed a display, that's how we preferred to fill that display. If a store had, you know, excess stock of, you know, some of our other packet sizes, then I could work out a swap similar to if they had unsaleable gum where I might take their overage in some packages and give them the pack sizes that went into that particular display; but the majority of the time the stock came from the store.

Q And was it your general practice at that time in 1978 to encourage the store and the store personnel to do the actual stocking of the display?

A Whenever possible. I felt my job was sales and not stocking.

Q Was it also your practice in 1978 as a sales representative to encourage the account that you were doing business with to order the product through the normal channels; that is, the wholesaler or the direct account or that store account that store dealt with?

A Whenever and wherever possible.

Q [Y]ou have also described a report which you have termed an agency stock check. Is that agency stock check in any sense an invoice?

A No. There is no mention of any kind of pricing on it.

Q Is that agency stock check in fact the way in which you, as a sales representative, accounted internally for the quantity of product which you kept on hand?

A Yes, that and, you know, so that a retailer would have a receipt.

(Tr. 8/26/85, pp. 98-99)

(4) In 1979, Wrigley established a training center in another state. No such facility was in existence during the tax years in question on this review.

(5) The department relies on the following cases in support of its claim that much deference is due to the commission's determination: *Milwaukee Transformer Co. v. Industrial Comm.*, 22 Wis. 2d 502, 510, 126 N.W.2d 6 (1964), *Chevrolet Division, G.M.C. v. Industrial Comm.*, 31 Wis. 2d 481, 488, 143 N.W.2d 532 (1966), *Mednis v. Industrial Comm.*, 27 Wis. 2d 439, 444, 134 N.W.2d 416 (1965), *De Leeuw v. ILHR Dept.*, 71 Wis. 2d 446, 449, 238 N.W.2d 706 (1976), and *Dairy Equipment Co. v. ILHR Department*, 95 wis. 2d 319, 327, 290 N.W.2d 330 (1980).

(6) Section TAX 2.82 of the Wisconsin Administrative Code, entitled "Nexus," was effective February 1, 1979. In its decision dated November 18, 1986, and "reaffirmed" by it on November 25, 1987, the commission relied on section 2.82(1)(b), which defines "business location" as follows:

> "Business location" includes a repair shop, parts department, purchasing office, employment office, warehouse, meeting place

for directors, sales of office, permanent sample or display room, research facility or a recreational facility for use of employes or customers. A residence of an employe or representative is not ordinarily considered a business location of the employer unless the facts indicate otherwise. It could be considered a business location under one or more of the following conditions: a portion of the residence is used exclusively for the business of the employer, the employe is reimbursed or paid a flat fee for the use of this space by the employer; the employe's phone is listed in the yellow pages under the name of the employer; the employe uses supplies, equipment or samples furnished by the employer; or the space is used by the employe to interview prospective employes, hold sales meetings, or discuss business with customers.

The commission also relied on sec. 2.82(4), which provides:

(4) WHAT CONSTITUTES "NEXUS." (a) *Factors*. If a foreign corporation has one or more of the following activities in Wisconsin, it is considered to have "nexus" and shall be subject to Wisconsin franchise/income taxes:

1. Maintenance of any business location in Wisconsin, including any kind of office.

2. Ownership of real estate in Wisconsin.

3. Ownership of a stock of goods in a public warehouse or on consignment in Wisconsin.

4. Ownership of a stock of goods in the hands of a distributor or other non-employe

representative in Wisconsin, if used to fill orders for the owner's account.

5. Usual or frequent activity in Wisconsin by employes or representatives soliciting orders with authority to accept them.

6. Usual or frequent activity in Wisconsin by employes or representatives engaged in a purchasing activity or in the performance of services (including construction, installation, assembly, repair of equipment).

7. Operation of mobile stores in Wisconsin (such as trucks with driver-salespersons), regardless of frequency.

8. Miscellaneous other activities by employes or representatives in Wisconsin such as credit investigations, collection of delinquent accounts, conducting training classes or seminars for customer personnel in the operation, repair and maintenance of the taxpayer's products.

9. Leasing of tangible property and licensing of intangible rights for use in Wisconsin.

10. The sale of other than tangible personal property such as real estate, services and intangibles in Wisconsin.

11. The performance of construction contracts and personal services contracts in Wisconsin.

(7) Those parts of the Multistate Tax Commission resolution relied upon by the commission appear, without citation, at pp. 22-24 of the decision attached to its order dated November November 18, 1986. In

"adopting" the part of its resolution reproduced in its decision, the commission omitted the following portion, quoted in Wrigley's brief to this court, as found in *All States Tax Guide* (P-H) sec. 694-C:

> [I]t is the intent of this Resolution" (1) that the contemplated document is to be *informational only* concerning each state's practices in regard to Public Law 86-272 and is not to serve as a basis upon which any person may rely as to a nexus conclusion with respect to any particular set of factual circumstances. . . .[Italics supplied.]

(8) The suggestion in the department's brief to this court (p. 22, fn. 6) that the commission's reference to the MTC guidelines should be ignored by this court because it appeared in an opinion signed by only one of its members must be rejected. The "Opinion" signed by Commissioner Timpken is physically attached to the "Decision and Order" drafted (as stated in the heading of that document) by Commissioner Timpken, signed by each commissioner, and released (together with Commissioner Junceau's separate dissent on the delinquent interest issue only) as a single document of 41 consecutively-numbered pages. That part of the document (pages 20-31) designated "Opinion" purports to speak for the commission as a whole by employing such language as: "When applying these [MTC] guidelines to the matter before *us*, *we* are compelled to conclude that Wrigley did indeed cross the line. . . ." (Italics supplied.) It sets forth the only ascertainable rationale for the commission's determinations which this court may utilize in determining what degree of deference may be due on the basis of the commission's exercise of expertise. No other member of the commission concurred separately or otherwise disassociated him- or herself from the opinion either at the time of the original decision or when it was

"affirmed" by the commission majority after remand in the face of a dissent criticizing the majority's reliance on the guidelines in question. The "Decision and Order Following Remand," signed by each member of the majority, referred to and clarified portions of the earlier Opinion in terms of "our" intention. In these circumstances, the opinion must be viewed as the collegial determination of the commission.

(9) A majority of the commission reaffirmed the original decision in the face of the following language from Commissioner Bartley's "Dissenting Opinion" at pp. 4-5 of the document released as the commission's "Decision and order on Remand":

> Adopting the statement of guidelines of the Multistate Tax Commission, the Commission reasoned that petitioner's activities in this state exceeded the levels of activity the guidelines permit a business to conduct in a state without subjecting itself to the state's taxing jurisdiction.
>
> What troubles me about the decision is that the guidelines were not then and [are] not now the law of this state, Wisconsin never having signed the statement of guidelines or otherwise [having] adopted them. Moreover, the statement of guidelines didn't even come into existence until 1985, some seven years after the last tax year involved in this case. The Commission nonetheless adopted the guidelines, an action which in my opinion was beyond its authority. Regrettably, the majority has perpetuated that error by today reaffirming that decision.

(10) *See also, Wisconsin's Environ. Decade, Inc. v. P.S.C.*, 81 Wis. 2d 344, 351, 260 N.W.2d 712, 716

(1978) (courts not bound by decisions of agency determining scope of agency's own power).

(11) Judge Nowakowski's opinion, at pp. 4-6, states in material part as follows:

> The only evidence in the record to support the Commission's finding on credit transaction involvement is the testimony of the two regional managers employed by Wrigley during the period in question and the company's formal position description for the regional manager. . . .There is nothing in the record by which the Commission could find that in 1976 to 1978 the regional manager "carried on" this activity other than to have concluded that Gary Hecht was lying [when he testified that he had no involvement of any kind in credit transactions with Wrigley customers while he was regional manager.] . . . .[T]he finding could only have [been] made through an assessment of Hecht's credibility. To have done so without the benefit of Commissioner Smith's impressions of Mr. Hecht violates Wrigley's rights to due process.
>
> DOR points to the position description for Hecht and seems to suggest not only that this constitutes substantial evidence to support the Commission's finding but also that this removes the issue from the realm of credibility evaluation. To the extent this argument is being made, it misses the point. Nexus with a state is established by reference to what a company's representatives did, not what they were authorized to do. It is "local activities" which support a state's taxing authority on the interstate operations of a foreign corporation. . . .It is also important to note that the franchise tax at issue here is imposed on an annual basis. The analysis of Wrigley's activities for qualification for the immunity of 15 U.S.C. Sec. 381 must also be done on an annual basis. . . .Even if Wrigley's activities in 1973 to 1975 remove its federal immunity to state taxation, this is not a permanent removal whereby Wrigley has no opportunity to regain it by altering its practices. [Citations omitted.]

(12) The only other Wrigley employee to be questioned about a "home office" was Richard Radosevic, who commenced work as a field representative during May of the last tax year at issue in this case. He testified as follows:

> Q During that same period of time, did you maintain an office in your home?
>
> A Not really.
>
> Q Why do you say not really?
>
> A Well, if you want to call my kitchen table and the basement [where he stored samples]--that was the extent of my office.
>
> Q Did you take a tax deduction for an office?
>
> A No, I did not.
>
> Q Did the Wrigley Company reimburse you for any expenses in connect[ion] with that office?
>
> A No.
>
> (Tr., 8/26/88, p. 65; p. 70)

(13) The commission's description of Wrigley's Wisconsin advertising as "non-incidental" seems to be a reference to the MTC guidelines which state that immunity is lost by activity "unrelated to solicitation," and set forth, as examples of *immune* advertising the following:

> 1. Advertising campaigns incidental to missionary activities.
>
> ****
>
> 5. Incidental and minor advertising, i.e., notice in newspapers that a salesman will be in town at a certain time.

Neither the guidelines nor the commission's decision otherwise elucidate the difference between "incidental" and "non-incidental" advertising.

(14) *Cf. United States Tobacco Co. v. Commonwealth*, 478 Pa. 125, 389 A.2d 471, cert. den. 439 U.S. 880 (1978) and *Coors Porcelain Company v. State*, 517 P.2d 838 (Colo. 1973), cert. den. 419 U.S. 874 (1974) with *Sjong v. State, Dept. of Revenue*, 622 P.2d 967 (Alaska 1981), appeal dism. 454 U.S 1131 (1982), *Olympia Brewing Co. v. Department of Revenue*, 266 Or. 309, 511 P.2d 837 (1973), cert. den., 415 U.S. 976 (1974), and *Clairol, Inc. v. Kingsley*, 109 NJ Super 22, 262 A2d 213, aff'd, 57 NJ 199, 270 A2d 702 (1970), appeal dism., 402 U.S. 902 (1971).

(15) The department contends that the statute should be interpreted in accordance with the rule that tax exemptions are to be strictly construed against the taxpayer, citing *Comet Co. v. Department of Taxation*, 243 Wis. 117, 123, 9 N.W.2d 620 (1943), and *MilwauKee E. R. & L. Co. v. Tax Commission*, 207 Wis. 523, 536, 242 N.W. 312 (1931). There are

two problems with this approach. The first is that 15 U.S.C. sec. 381 is not an "exemption" conferred by the legislative body having power to impose the tax in the first place; it is an *immunization* from state taxation, in the form of a prohibition against the exercise of state power to tax, decreed by the legislative body having exclusive power under the United States Constitution to regulate interstate commerce. Second, a "strict construction against the taxpayer" would vary, depending on whether the particular taxpayer is a foreign corporation, as here, asserting that its acts in this state were no more than immunized solicitation, or a Wisconsin taxpayer asserting in a "reverse nexus" case that its acts in another state exceeded solicitation, thus giving that state jurisdiction to tax an allocable portion of its total net income. Wisconsin's commission has enunciated a policy, which would seem to comport with constitutional principles as well, that it will "apply the same standards in determining 'nexus' with other states in 'throw back' [reverse nexus] situations as in determining foreign corporation's nexus with Wisconsin" in cases involving the application of 15 U.S.C. sec. 381. *Grande Cheese Company v. Wisconsin Department of Revenue*, Wis. Tax Reptr. [CCH] para. 202-595, at 12,781.

(16) *Herff Jones Co. v. Tax Com.*, 410 P. 2d 233 (Or. 1966).

(17) *Iron Fireman Co. v. Tax Com.*, 445 P.2d 126 (Or. 1967), cited in *Miles Laboratories, Inc. v. Department of Revenue*, 546 P.2d 1081, 1083 (Or. 1985).

(18) It is not clear whether Washington actually sought to impose a tax on the net income Miles claimed was taxable in that state. The Oregon Supreme

Court stated at the outset that the issue was "whether a portion of plaintiff's income *would be taxable* by the state of Washington, on the portion of its income derived from its Washington activities, *if that state had tax statutes similar to Oregon's statutes*," and footnoted an Oregon statute under which Miles was "taxable" in Washington if Washington has jurisdiction to levy a tax upon plaintiff's net income "regardless of whether, in fact, the state does or does not." 546 P.2d at 1081-82; italics supplied. At the conclusion of its opinion it noted that it was unnecessary to consider Mile's "contention that because it pays a corporate license and franchise tax to the state of Washington it is entitled to apportion its income under" the same statute. 546 P.2d at 1083. It seems likely that the court's resolution of the case made it unnecessary to consider whether Miles' payment of Washington franchise taxes under statutes dissimilar to those in Oregon entitled it to allocate income under Oregon law.

(19) *See, eg., Hervey v. AMF Beaird, Inc.*, 464 S.W. 557 (Ark. 1971) (regular checks of customers' inventories *itself* extends beyond scope of solicitation of orders where goods were held by customer under consignment contract, since: "[e]ven if it should be said that this activity helped to produce orders, it is equally reasonable to conclude that Beaird's interest was in protecting its property rights in the items shipped to the various parties with whom it had contracts, to establish the basis for billing these parties, and to determine whether conditions in any particular instances required invocation of rights reserved in the various contracts." 464 S.W.2d at 562.); *Sjong v. State Dept. of Revenue*, 622 P.2d 967 (Ala. 1981) (non-resident crab fisherman who neither solicited nor placed orders within Alaska, but who both delivered to

Alaska purchasers from outside the state *and sold tangible personal property within the state* was subject to taxation by Alaska since, in order to qualify for "exemption" under federal statute, "business activities must conform strictly to the language of the statute." 622 P.2d at 975); *Chattanooga Glass Co. v. Strickland*, 261 S.E.2d 599 (Ga. 1979) (glass bottle manufacturer whose representatives remedied customer complaints about previously-purchased products, and which both purchased broken glass from customers in Georgia as raw material for production in another state and maintained storage containers in Georgia for collection purposes exceeded solicitation immunity by activities non-incidental to sales. 261 S.E.2d at 601).

(20) Coors was a Colorado manufacturer of porcelain and ceramic products which it sold in 19 states through ten field representatives, all of whom were trained specialists in ceramics, and all of whom had "business offices" outside Colorado in states where the products were sold and the salesmen resided. In this "reverse nexus" case, the Colorado Supreme Court upheld the lower court's determination that all of the corporation's income was taxable in Colorado because none of the following activities exceeded solicitation: demonstrating Coors products; designing parts to be manufactured by Coors for a particular customer; recommending designs to customer's engineers to solve particular customer problems; presenting price quotations and negotiating prices; discussing with customers any complaints or problems regarding purchased products; *on occasion* possessing Coors products for shipment to the customer and retaining Coors

products rejected by the customer. 517 P.2d at 839-40. The court said:

> From the stipulated facts, the only possible extension by Coors' out-of-state representatives beyond the solicitation of orders is the statement that "on occasion they possessed Coors products for shipment to the customer and also retained Coors products which have been rejected by the customer [upon] delivery. It appears that these acts are not in common practice and are the exception rather than the rule. 517 P.2d at 840.

(21) Ciba was a New Jersey manufacturer of prescription drugs sold in all fifty states to retail druggists and wholesale pharmaceutical companies. Its twelve "professional service representatives" in Missouri solicited orders from Missouri druggists and also assisted pharmacists in taking inventory, "operated" from their homes in Missouri, assembled periodically in motel rooms for sales meetings "of an educational nature," and called on doctors to explain products in an effort to induce doctors to prescribe Ciba products to patients. 382 S.W.2d at 651-52. In holding that these activities did not exceed the protection of 15 U.S.C. sec. 381, the court said:

> We find nothing in the facts. . .to indicate any business or financial transactions took place when the representatives "detailed" the doctors, or when they distributed free samples, or when they gave out literature, or when the representatives met together[.] [T]hese were not business transactions where finances were involved or taxable income produced or any intrastate commerce involved. The only financial transactions were between respondent

> and the druggists or the hospitals that order drugs, and that is in interstate commerce. 382 S.W.2d at 652.

***

> In adopting Public Law 86-272 Congress is clearly, in our opinion, undertaking to regulate interstate commerce by providing a uniform statement of the facts, circumstances and conditions under which a state may not burden interstate commerce by state income taxes. . . .
>
> Respondent distributes its products into all of the fifty states and every state that seeks to levy an income tax on any such foreign corporation doing interstate commerce within its boundaries necessarily imposes an income tax under a different statute. The determination of the amount of the tax due each state and whether the amount bears a proper relationship to the particular activities carried on in each of the taxing states would alone impose a heavy burden, hindering and limiting interstate commerce. 382 S.W.2d at 657.

(22) In *Miles, supra*, 546 P.2d at 1082, the stipulated facts included the fact that Miles "has spent $649,200 for television advertising in Washington." This fact was not mentioned by the court, whose determination that immunity had been lost rested solely on representatives' acts of replacing damaged goods and arranging displays. 546 P. 2d at 1083. Similarly, the appellate court in *Clairol, supra*, 262 A.2d 213, did not mention in its opinion the facts found by the tax agency, whose findings were appended to the New Jersey Supreme Court's per curiam affirmance of the appellate court's opinion,

270 A.2d 702, as to Clairol's substantial national advertising or its partial reimbursement to retailers who advertised its products. In *Drackett, supra*, 370 N.W.2d at 725, the court noted as undisputed the fact that Drackett's resident salesman "assisted wholesalers with arrangements for providing newspaper advertising copy to the retailers," but did not deem that fact sufficiently significant to mention in its determination that "a number of" the company's ongoing activities exceeded solicitation. 370 N.W.2d at 726.

(23) Commissioner Bartley's dissenting opinion, at p. 26, states:

> No one can seriously maintain that advertising is something fundamentally different from solicitation. In fact, it really is solicitation itself. Advertising is "any oral, written, or graphic statement made by the seller in any manner in connection with solicitation of business. . . ." [Quoting *Black's Law Dictionary*, Fifth Ed. at 50.]

(24) *See Ciba, supra*, 381 S.W.2d at 648 (sales representatives "operate from their homes") and 652 (representatives "assemble periodically for sales meetings. . .usually in motel rooms"); *Clairol, supra*, 270 A.2d at 703 (although representatives not required to use home space for business purposes, business card gives home address and telephone number of representative); *Cal-Roof Wholesale, supra*, 410 P.2d at 234 (salesman maintained "no office except for his home"); *Coors Porcelain Company, supra*, 517 P.2d at 839 (salesmen reside in and maintain their business offices outside the State of Colorado and in states where Coors products are sold"); *Kimberly-Clark, supra*, 416 N.E.2d at 1266 ("each salesman worked from his

home"); *Smith-Kline, supra*, 403 P.2d at 376 (each salesman maintains stocks of samples at home, business cards carry home number).

(25) *Cf., Robbins v. Shelby*, 120 U.S. 489, 30 L.Ed. 694 at 696 (1886): "[A] State cannot impose taxes upon persons passing through the State, or coming into it merely for a temporary purpose especially if connected with interstate commerce." This was a part of the established constitutional doctrine with respect to travelling salesmen or "drummers" which *Portland Cement, supra*, 358 U.W. 450 (1959) was viewed as having unsettled, thus leading to the enactment of 15 U.S.C. sec. 381. *U.S. Tobacco Co. v. Com., supra*, 386 A.2d 471, 481.

(26) See Commissioner Bartley's dissent, pp. 13-16 of Decision and Order on Remand, concluding that, even assuming the applicability of the agency's 1979 nexus regulations covering home offices, the requirements of those regulations were not fulfilled by the facts of this case.

(27) *Cf.*, Commissioner Bartley's dissent, p. 14 of Decision and Order on Remand: "Wisconsin-based salesmen should not be required to leave our state and travel to garden spots like Waukegan, Illinois, to talk business."

(28) The department also cites *Ringgold Coal Mining Co. v. Taxation Division Director*, N.J. Tax Rptr. [CCH] p. 201-011 (April 29, 1982), as additional support. In that case, a New Jersey tax court judge, following *Clairol, supra*, noted as one of several activities through which the corporation was held to have forfeited immunity under the federal statute the undetailed supervisory activities of its corporate vice president. The case is not on point

with the facts of this case, and its reasoning is not persuasive.

(29) *See, e.g.*, testimony of Regional Manager Kroyer at Tr. 8/27/85, pp. 17-19.

(30) *Indiana Dept. of Revenue v. Kimberly-Clark Corp., supra*, 416 N.E.2d 1268, *Coors Porcelain Company v. State, supra*, 517 P.2d at 843; *Drackett Products Co. v. Conrad, supra*, 370 N.W.2d at 723.

STATE OF WISCONSIN

TAX APPEALS COMMISSION

WILLIAM WRIGLEY JR. COMPANY Wrigley Building 410 North Michigan Avenue Chicago, IL 60611	*	DOCKET NO. I-8591
Petitioner,	*	**DECISION AND ORDER**
vs.	*	**ON REMAND**
WISCONSIN DEPARTMENT REVENUE OF P.O. Box 8933 Madison, WI 53708	*	
Respondent.	*	

THOMAS R. TIMKEN, COMMISSIONER:

The above-entitled matter has been remanded to this Commission by a Decision and Order issued on August 20, 1987 by Dane County Circuit Judge Michael Nowakowski. In his Decision and Order, Judge Nowakowski instructed this Commission to consult personally with former Commissioner William Bradford Smith concerning his

impressions of the credibility of certain witnesses and the weight to be accorded their testimony.

This Commission took the following steps in compliance with this remand order:

(1) The entire Commission file in this matter was provided Commissioner Smith for his perusal and review.

(2) Mr. Smith was invited to and attended executive sessions of this Commission held on September 21, 1987 and October 12, 1987 while all (5) members were present.

(3) Mr. Smith's views were solicited as to the credibility of the testimony of Gary Hecht and John Kroyer and the weight to be accorded that testimony.

(4) Mr. Smith advised the Commission that he found the testimony of Gary Hecht and John Kroyer to be "extremely credible" and would accord it great weight.

After consultation with former Commissioner William Bradford Smith, the majority of this Commission reaffirms its Decision and Order of November 18, 1986.

The credibility of Messieurs Hecht and Kroyer, both witnesses called by petitioner William Wrigley Jr. Company, as well as the other witnesses who testified, was never questioned or in issue by this Commission. That testimony was completely accepted and accorded substantial weight. Although the company job descriptions of both Hecht and Kroyer called for them to participate in credit transactions, it is clear and uncontroverted from their testimony that Gary Hecht, regional manager from 1976 to 1978, had no involvement of any kind in credit transactions with Wrigley customers while John Kroyer, regional manager from 1973 to 1975, did.

This Commission never believed or concluded or intended to intimate that Gary Hecht or any other witness lied or was in any way untruthful.

Although the credit transaction was highlighted in its Opinion, this Commission did not rest its decision on that

basis alone but rather relied on the totality of all the different non-immune activities specified at page 25 of its Opinion, including the credit activities in 1973 to 1975 as well as the maintaining home offices and conducting regular and periodic training seminars in Wisconsin, which findings were based on the unimpeached, credible testimony of petitioner's own witnesses which are supported by the record.

Therefore,

IT IS HEREBY ORDERED

That this Commission's Decision and Order of November 18, 1986 be and the same is hereby affirmed.

Dated at Madison, Wisconsin, this 25th day of November, 1987.

WISCONSIN TAX APPEALS COMMISSION

(Not Participating)
Kevin C. Potter, Chairperson

/s/ Thomas R. Timken
Thomas R. Timken, Commissioner

/s/ John P. Morris
John P. Morris, Commissioner

/s/ Robert C. Junceau
Robert C. Junceau, Commissioner

(Dissenting)
Douglass H. Bartley, Commissioner

pc: Petitioner
Representative
Respondent

ATTACHMENT: **"NOTICE OF APPEAL INFORMATION"**

DISSENTING OPINION

DOUGLASS BARTLEY, COMMISSIONER:

Pearl Buck once said, "Every great mistake has a halfway moment, a split second, when it can be recalled and perhaps remedied." The remand of this case was our halfway moment, our chance to recall the original decision in this case -- a decision I believe to have been an errant shot that wounded legally-protected salesmanship.

When the Commission originally decided this case, it held that petitioner's activities in the state were sufficient to give the state jurisdiction to tax petitioner's income.[1] Adopting the statement of guidelines of the Multistate Tax Commission,[2] the Commission reasoned that petitioner's activities in this state exceeded the levels of activity the guidelines permit a business to conduct in a state without subjecting itself to the state's taxing jurisdiction.

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[1]CCH Wis. Tax Rep., ¶202-792.

[2]"Information Concerning Practices of Multistate Tax Commission States under Public Law 86-272", adopted as a Resolution on June 21, 1985. The statement is set forth at CCH Wis. Tax Rep., ¶350a.

What troubles me about the decision is that the guidelines were not then and not now the law of this state, Wisconsin never having signed the statement of guidelines or otherwise adopted them. Moreover, the statement of guidelines didn't even come into existence until 1985, some seven years after the last tax year involved in this case. The Commission nonetheless adopted the guidelines, an action which in my opinion was beyond its authority.[3] Regrettably, the majority has perpetuated that error by today reaffirming that decision.

Before discussing what I believe would have been the correct approach to the case, I should like first to review the procedural history and the facts.

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[3]The Commission is a judicial or quasi-judicial body whose powers are limited to resolving questions of law and fact arising under the tax laws of Wisconsin. Section 73.01 Wisconsin Statutes. Thus it has no legislative powers. In resolving these disputes, the Commission must apply applicable law. Since Wisconsin did not adopt the guidelines, it's hard to see how the Commission can incorporate them into our law.

I.

PROCEDURAL HISTORY

This case came before us originally on petitioner's timely appeal of respondent's assessment of $246,641.04 in taxes, interest, and penalties for the years 1973-78. The Commission sustained the assessment of taxes and penalty, but reversed the assessment of interest at the delinquent rate.[4] Commissioner William Bradford Smith heard the case, but his term of office ended before the decision was rendered, and he neither participated in the decision nor was he otherwise involved in it in any way.

In the decision, the Commission held that Wisconsin had jurisdiction to tax petitioner because petitioner's activities in the state went beyond immune solicitation and thus fell outside the perimeter of jurisdictional protection afforded by federal law.[5] Grounding its decision on the guidelines mentioned above, the Commission cited various

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[4]CCH Wis. Tax Rep., ¶202-792.

[5]P.L. 86-272 is set forth at note 17.

activities which occurred in Wisconsin as compelling the holding that the state had jurisdiction:

1. replacement of stale gum
2. maintaining product displays both as to location design and content
3. direct sales of gum * * *
4. maintaining offices in home
5. conducting regular and periodic training seminars in Wisconsin
6. recommending hiring, firing and release of sales representatives in Wisconsin by regional manager
7. involvement in credit transactions by regional manager
8. training and supervising sales representatives by regional sales manager
9. rental of storage space in Madison, Wisconsin
10. the purchase of non-incidental advertising in Wisconsin[6]

In reaching its ruling, the Commission emphasized its finding that petitioner's Wisconsin-based regional manager was involved in credit activities. That involvement, said the Commission, "alone clearly exceeds the 'solicitation of orders'."

Petitioner appealed the Commission's ruling, and the case is before us now on remand from Dane County Circuit Court, the Court having held the Commission's decision to

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[6]CCH Wis. Tax Rep., ¶202-792.

be legally flawed because Commissioner Smith was not consulted on certain evidentiary questions of credibility, weight, and inference relating principally to the testimony of one of petitioner's witnesses, its Wisconsin regional manager Gary Hecht.[7] Hecht, who served on that job in 1976-78, had testified that he was not during that time involved in any credit matters, and the Judge observed that there was nothing in the record to support the Commission's implicit finding that Hecht participated in any such activities "other than to have concluded that [he] was lying."[8]

In remanding the case, Judge Nowakowski ordered the Commission to "consult personally with Mr. Smith concerning his impressions of the credibility of the witnesses and the weight to be accorded their testimony" and to reconsider the case in light of his impressions.[9]

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[7]Memorandum of Decision and Order, Case Nos. 86-CV-6679 and 86-CV-6796, Dane County Circuit Court.

[8]Id. at 5.

[9]Id. at 10-11.

The Commission has conferred with Mr. Smith on several occasions, and it is his conclusion that Hecht's testimony was "extremely credible."

II.

FACTS

Petitioner, an Illinois corporation headquartered in Illinois, manufactured and sold chewing gum throughout the country. It had substantial sales in Wisconsin, but, on the advice of counsel, neither filed Wisconsin franchise tax returns nor paid any franchise taxes here in any of the years under review.

Petitioner's Wisconsin sales operations were directed by a regional manager who lived and worked in the state. The regional manager's activities here included supervising the four or five salesmen working the state, evaluating their performance, recommending raises for them, recommending the hiring and firing of them, supervising their on-the-job training, reviewing their sales reports, substituting for them when they were ill, and

reapportioning sales districts. The regional manager was not reimbursed by petitioner for the expense of his office but was reimbursed for various other business-related expenses.

From 1973 through 1975, John Kroyer was the regional manager. Mr. Kroyer maintained an office in his home where he held one sales meeting a year, and kept files, display racks, promotional literature, and a stock of gum. Two to three times a year, to protect future sales, Mr. Kroyer would intervene in credit disputes between a customer and petitioner's credit department. Once a year Mr. Kroyer would have a sales meeting in his home, and once he held a sales meeting in a Madison hotel. But his successor, Gary Hecht, who served during the years 1976-78, was not involved in any credit matters, nor did he hold any sales meetings in his home.

The salesmen's activities here included calling on customers or prospects, setting up displays and maintaining them, checking customer inventories of gum for freshness, and replacing stale gum. Each salesman had

a supply of gum, display racks, and promotional literature which, with one exception, were stored in his residence. One salesman kept his supplies in storage in Madison paid for by petitioner. All the salesmen used vehicles supplied by petitioner, which petitioner either leased or owned. All were reimbursed for various expenses incurred in the course of their activities.

In almost all cases, the orders solicited by the salesmen were submitted to petitioner's headquarters in Illinois for approval or rejection. If approved, the orders were then filled by shipping the gum from Illinois to the customer in Wisconsin by common carrier. Occasionally, however, on the average of once a month, each salesman sold $8 to $16 (of retail value) of gum directly from his own supply.

During the years in question, petitioner through a Chicago agency purchased extensive print and broadcast advertising seen or heard in Wisconsin.

III.

LAW

As noted at the outset of this opinion, the guidelines of the Multistate Tax Commission are not and never have been a part of our law. Thus we must turn to our own law for guidance. But first let us restate the issue.

The issue is whether Wisconsin, by virtue of petitioner's activities in the state during the years 1973-78, had jurisdiction to impose a franchise tax on petitioner for those years? Or was petitioner immune from taxation because its activities constituted protected solicitation under federal law limiting the jurisdiction of states to tax the income of foreign corporations?

To determine whether any of petitioner's activities in Wisconsin constituted a jurisdictional basis for the state to tax petitioner, we must apply the jurisdictional rules embodied in our law construed *in pari materia*[10] with the

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[10]Sutherland, *Statutory Construction*, sec. 51.06, citing *Nekoosa-Edwards Paper Co. v. Railroad Commission*, 193 Wis. 538 (1927).

jurisdictional limits imposed on states by the federal law, P.L. 86-272.[11]

Unfortunately, Wisconsin's jurisdictional statute doesn't give us much specificity on what business activities give the state taxing jurisdiction over foreign corporations.[12] So, for the time being, we must look beyond the statute.

There are some jurisdictional rules contained in state regulations which were cited by respondent and either accepted or not contested by petitioner.[13] Here again we have a problem--one that neither side explained. The problem is that the regulations weren't created until

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[11]P.L. 86-272 is set forth at note 17.

[12]Section 71.07(2), set forth post at ___, requires that a foreign corporation must be "doing business" in the state for the state to have taxing jurisdiction.

[13]Respondent in its brief cited certain portions of Section Tax 2.82(4) of the Wisconsin Administrative Code. Petitioner referred to several of these sections in its brief without contesting their applicability and did not mention the other sections.

1979,[14] which was the first year after the last tax year under review in this case.

Because the regulations weren't in effect during the years involved, one wonders how they have a bearing on this case. But because the parties evidently agreed they were relevant and because it's possible, perhaps likely, that the rules codified settled practices, policies or interpretations of the department, I believe it proper, indeed necessary at this point, that they be considered as a manifestation of law applicable to this case.[15] I would have asked the parties to brief the issue of applicability, but such is not the prerogative of one in lone dissent. Thus I proceed unenlightened on this important question -- with all due disclaimers to those who require

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[14]Section Tax 2.82 was created in January 1979.

[15]Considerable weight is accorded an agency's construction of a statute. *City of Milwaukee v. DIHLR*, 106 Wis. 2d 254 (1982). My research has been singularly unfruitful in determining whether the regulations had any sort of official standing before they were created. But because they were accepted by both sides, I think it proper to give them weight as a codification of prior agency practices.

solid legal footings upon which the reason toward result is built and to those who disdain somewhat speculative exercises. Ahead in this opinion I will try to bridge any regulatory gap by assuming that the regulations in question did not exist and attempt to analyze the case on a purely statutory basis.[16]

The regulations involved are contained in Section Tax 2.82(4) of the Wisconsin Administrative Code:

"(4) WHAT CONSTITUTES 'NEXUS.'

(a) Factors. If a foreign corporation has one or more of the following activities in Wisconsin, it is considered to have "nexus" and shall be subject to Wisconsin franchise/income taxes:

1. Maintenance of any business location in Wisconsin, including any kind of office.

* * *

5. Usual or frequent activity in Wisconsin by employes or representatives soliciting orders with authority to accept them * * *.

6. Usual or frequent activity in Wisconsin by employes or representatives engaged in a purchasing activity * * *.

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[16]Post at ___.

8. Miscellaneous other activities by employees or representatives in Wisconsin such as credit investigations, collections of delinquent accounts, conducting training classes or seminars for customer personnel in the operation, repair and maintenance of the taxpayer's products.

9. Leasing of tangible property * * * for use in Wisconsin."

The other source of applicable law we must consider is Public Law 86-272 which provides that if a foreign corporation's only activities in a state are soliciting orders for goods which are accepted and filled outside of the state, the state has no jurisdiction to tax the net income of the corporation.[17]

Here our task is to decide whether under our regulations, construed with references to the overriding

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[17]P.L. 86-272 is set forth at 15 USC Section 381:

"No State * * * shall have power to impose * * * a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year * * * [constitute] * * * the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and if approved, are filled by shipment or delivery from a [footnote ends].

federal jurisdictional limits on states, any activities conducted or sponsored by petitioner in Wisconsin produced a lawful nexus of jurisdictional power.

A.

Maintenance of a business location

We deal first with Section Tax 2.82(4)(a)(1), ante at ___. Respondent argued that because petitioner's sales manager and salesmen had offices in their residences, the state gained jurisdiction to tax petitioner.

A reading of that regulation, standing by itself, does not suggest such a result, for explicit in the preface to its text is the precept that the corporation involved must itself have had the business location or office. Here the employees, not the corporation, had the offices.

Respondent pointed out that there is another applicable regulation on this issue, namely Section Tax 2.82(1)(b):

"A residence of an employe * * * is not ordinarily considered a business location unless the facts indicate otherwise. It *could* be

> considered a business location under one or more of the following conditions:* * * the employee uses supplies, equipment or samples furnished by the employer; or the space is used by the employe to * * * hold sales meetings * * *." (Emphasis added.)

Because the regional manager at one time conducted sales meetings in his in-residence office, that office, respondent contended, gave Wisconsin jurisdiction to tax petitioner.

I must reject this argument for three reasons.

First, the regulation is directory, not mandatory.[18] The use of the word "could" leads me to believe that the draftsmen intended a judicious, not a mechanical, application of the regulation. I think the word "could" was intended as a signal that no one of the enumerated activities, or even a combination of them, was to result in an automatic finding of jurisdiction. The intent, I believe, was to indicate that the totality of circumstances must be

[18]Ordinarily, the use of a permissive term such as 'could' carries no mandate. Sutherland, *Statutory Construction*, sec. 57.03.

weighed in determining when an employee's home office becomes his employer's business location.

Weighing all the circumstances, I conclude the residential offices were not nexus-creating. It is here significant that petitioner's employees were not reimbursed for the costs of having offices, and that neither the employees nor petitioner held the residential offices out as being Wrigley offices. Also it's hard to believe that the draftsmen intended to, in effect, outlaw sales meetings in this state. Wisconsin-based salesmen should not be required to leave our state and travel to garden spots like Waukegan, Illinois, to talk business.

Second, normal rules of statutory construction mandate an interpretation inconsistent with respondent's argument. It's a cardinal principle of our law that statutes which purport to impose a tax must contain clear and express imposition language, and ambiguity and doubt must be resolved in favor of the putative taxpayer.[19] That

[19]*Wisconsin Department of Revenue v. Milwaukee Mutual Insurance Co.*, 105 Wis. 2d 705 (App. 1981).

principle, in my opinion, applies *a fortiori* when the tax imposition language is imposed by a mere regulation, promulgated by the taxing authority itself. Here the use of the word "could" casts great doubt on the meaning of the regulation. It gives little guidance to anyone as to what is proscribed and what is not. Borrowing from Southey, one might say that the regulation is "a perfect nonplus and a baffle to all human understanding." But perhaps it's better to say that even when read in the best light possible, the regulation's meaning remains enshrouded in vapors and mists of ambiguity.

Third, even if given a broad construction, in sweep the regulation goes far beyond what federal law allows as a nexus for state jurisdiction. P.L. 86-272 says that a state can't gain jurisdiction over a business just because its salesmen solicit in that state.[20] I believe that protected solicitation includes not only the precise act of attempting to secure a sale, but also all other activities necessary or proper for the solicitor to peddle his wares. If the end be

[20]See note 17.

protected, all reasonable and proper means toward that end must also be protected. A salesman's office in his residence falls in the category of a proper ingredient of the selling itself. Even the smoothest-talking purveyor of the highest quality snake oil needs a retreat to reflect on strategy, to rehearse tactics, and to inculcate and motivate assistants.

For these reasons, I conclude that the residential offices of petitioner's employees did not give the state jurisdiction.

B.

Usual or frequent direct sales

We deal next with Section Tax 2.82 (4)(a)(5), ante at ___, which gives the state jurisdiction when salesmen make "usual or frequent" sales on the spot, in contradistinction to having the sales accepted by out-of-state personnel. Here petitioner's salesmen, on the average of once a month, sold $8-$16 worth of gum on their own -- that is, by their direct acceptance of customer orders. Respondent

seemed to argue that these direct sales were usual and frequent and gave the state jurisdiction.

Again I must disagree. Although there is no question that the sales were direct, I conclude that such sales can only be characterized as unusual and infrequent because they were but a pittance. For example in 1978, direct sales amounted to at most $600, or 7/100,000 of one per cent of Wrigley's $4,392,202 of Wisconsin sales that year. Looking at this in a slightly different perspective, direct sales of Wrigley's gum were barely enough to supply three avid, two-pack-a-day chewers with enough Juicy Fruit to last through the year. That's not enough gum to stick jurisdiction on Wrigley even if the chewers are doubling their pleasure.

C.

Leasing of cars for use in Wisconsin

Respondent also argued that petitioner's leasing of cars for use by the salesmen in Wisconsin gave the state jurisdiction to tax petitioner under Section Tax 2.82

(4)(a)(9), ante at ___. There are a number of difficulties with this approach.

First, my reading of the regulation is that it refers to a taxpayer who is a lessor in the business of leasing personal property which is used in Wisconsin and not to the situation, as here, where the taxpayer is simply a lessee of property that finds its way into Wisconsin.

Second, even if my reading above is wrong, the regulation still did not give jurisdiction. A full review of the regulation, including the prefatory text, requires not only a finding that the cars were used in Wisconsin, but also that they were leased in Wisconsin by Wrigley. The record is silent on where the cars were leased, and we cannot simply presume that Wrigley consummated the lease in Wisconsin. In fact, a more reasonable inference would be that the lease was consummated through Wrigley's corporate headquarters in Illinois.

Third, as with the business location regulation, even if given a broad construction, the leasing regulation would contravene P.L. 86-272 in that its jurisdictional swath is

too wide. A travelling salesman's car is obviously necessary to his solicitations. It's something without which few sales could be made, and as such, part and parcel of the protected solicitation itself.

D.

Purchasing activity

Respondent argued that Wrigley's advertising seen or heard in Wisconsin created nexus. Respondent, in making this argument, was apparently[21] relying in part on Section 2.82(4)(a)(6), ante at ____, which creates nexus when there is "[u]sual or frequent activity in Wisconsin by employees or representatives engaged in a purchasing activity * * *."

This argument fails for the same reason respondent's argument about leasing cars failed -- the nexus creating activity must be shown to have occurred in Wisconsin.

[21]I say "apparently" because respondent cited the purchasing activity regulation as part of the law governing the case but doesn't specifically discuss it in relation to any specific activity of petitioner or its employees.

Here, the record shows that the purchasing of the advertising was not physically accomplished in Wisconsin -- it was all done through a Chicago agency.

E.

Miscellaneous activities

Thus far we have concluded that neither the offices-in-home, nor the direct sales, nor the leased cars, nor the advertising were enough to have given the state jurisdiction to tax petitioner. I now consider whether any of petitioner's remaining activities caused the state to have gained jurisdiction.

The activities which I have grouped under this heading are the salesmen's replacement of stale gum, maintenance and location of display cases, the keeping of a stock of gum, display racks, and promotional literature, one salesman's rental of storage space for such supplies, one regional manager's holding of annual sales meetings in his home and one meeting in a hotel and his intercession in credit

disputes, and both regional managers' supervision of their salesmen.

I have collected these activities under the heading "miscellaneous activities" because there seems to be no other asserted basis for the state's invoking jurisdiction here, and respondent in its brief cited the nexus catch-all regulation, Section Tax 2.82(4)(a)(8), ante at _____, as being a relevant factor for us to consider.

To determine whether any of these activities constitute "miscellaneous other activities by employees or representatives in Wisconsin" conferring nexus on Wisconsin, we must ascertain the meaning of these general words by resorting to rules of construction.

The rule which applies here is *ejusdem generis*, a maxim which posits that where general words follow an enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated.[22] That's

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[22]Sutherland, *Statutory Construction*, sec. 47.18. The maxim "rests on practical insights about everyday language usage. (continued...)

precisely the situation with Section Tax 2.82(4), which is an enumeration of a class followed by the general words "miscellaneous other activities". The application of *ejusdem generis* thus means that "miscellaneous other activities" cannot be construed to their widest extent but must be limited to those activities of the same kind or character as the specifically enumerated activities.

A review of the full text of the regulation is necessary to define the common denominator of the enumerated class:

"(4) WHAT CONSTITUTES 'NEXUS.'

(a) Factors. If a foreign corporation has one or more of the following activities in Wisconsin, it is considered to have "nexus" and shall be subject to Wisconsin franchise/income taxes:

1. Maintenance of any business location in Wisconsin, including any kind of office.

2. Ownership of real estate in Wisconsin.

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[22](...continued)
When people list a number of particulars and add a general reference like 'and so forth', they mean to include by use of the general reference not everything else but only others of like kind." Id.

3. Ownership of a stock of goods in a public warehouse or on consignment in Wisconsin.

4. Ownership of a stock of goods in the hands of a distributor or other non-employe representative in Wisconsin, if used to fill orders for the owner's account.

5. Usual or frequent activity in Wisconsin by employes or representatives soliciting orders with authority to accept them.

6. Usual or frequent activity in Wisconsin by employes or representatives engaged in a purchasing activity or in the performance of services (including construction, installation, assembly, repair of equipment).

7. Operation of mobile stores in Wisconsin (such as trucks with driver-salespersons), regardless of frequency.

8. Miscellaneous other activities by employees or representatives in Wisconsin such as credit investigations, collections of delinquent accounts, conducting training classes or seminars for customer personnel in the operation, repair and maintenance of the taxpayer's products.

9. Leasing of tangible property and licensing of intangible rights for use in Wisconsin.

10. The sale of other than tangible personal property such as real estate, services and intangibles in Wisconsin.

11. The performance of construction contracts and personal services contracts in Wisconsin."

Considering just the enumerations contained in the regulation on miscellaneous nexus activities, and applying *ejusdem generis* to identify a common denominator, we see that none of the listed items (credit investigations, collections, and repair and maintenance seminars) can be characterized either as selling in general or as selling as it was done in this case. The common denominator of the class of enumerations is that they are all non-selling activities -- functions that salesmen would not normally undertake. Thus, within its own framework of enumerations, the regulation covering miscellany cannot be construed as including sales-related activities.

Considering the regulation *in toto*, and reading it in connection with the prefatory language, one is left with the strong impression that the common characteristics of the enumerated activities is that each involves a substantial non-selling business presence within the borders of this state -- a presence beyond one principally motivated by the sale of goods accepted and filled outside the state. The dominant theme of the enumerations, taken as a whole, is

to establish a class of activities that are non-solicitory in nature.

Because none of the activities undertaken here by Wrigley or the employees is explicitly or implicitly addressed by the enumerated nexus factors of the regulation, I conclude that none can be sucked into the jurisdictional black hole of nexus miscellany. On the contrary, the activities are by nature part of solicitation. The replacement of stale gum, the maintenance and location of sales displays, the keeping of a stock of gum for samples and minuscule spot sales, the promotional literature, the storage of sales supplies and materials, the sales meetings, the supervision of salesmen, and even the intervention in the credit disputes all had in common one purpose -- the stimulation of sales. Therefore none of these activities can be characterized as non-solicitory, and none meets the required common denominator of the class.

F.

The statute

Having concluded that none of the Wisconsin nexus regulations operates to give the state jurisdiction here, I now consider whether the statute itself confers taxing jurisdiction on the state. As I mentioned earlier, we need to come to terms with this because of the possibility that the nexus regulations, or the principles in them, were not in effect during the tax years involved in this case.

The only statutory treatment of the subject of jurisdiction is contained in Section 71.01(2) of the Wisconsin Statutes.

> "For the privilege of * * * doing business in the state in a corporate capacity * * * every * * * foreign corporation * * * shall annually pay a franchise tax * * *."

Superimposed on the Wisconsin jurisdictional requirement of doing business are the jurisdictional limitations on states contained in Public Law 86-272 which, as we have noted, says that if a foreign corporation's only activities in a state are soliciting orders

for goods which are accepted and filled outside of the state, the state has no jurisdiction to tax the net income of the corporation.[23] Reading the federal jurisdictional limitation into the Wisconsin statute produces a statute which would read (somewhat condensed) something like this:

> "For the privilege of * * * doing business in this state in a corporate capacity * * * every * * * foreign corporation * * * shall annually pay a franchise tax * * *. The term "doing business" in the preceding sentence shall not be construed to include the solicitation of orders for sales of goods that are accepted, and filled from, outside this state."

Did the statute, as so amended, give the state jurisdiction? Breaking the question down further, did any of petitioner's activities in the state constitute something more than soliciting orders which were accepted and filled outside Wisconsin? As we shall see, for all but one activity (direct sales), the question boils down to one of what is solicitation?

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[23]P.L. 86-272 is set forth at note 17.

Let's reconsider petitioner's activities, this time measuring them against the bare statute.

1.

Maintenance by employees of offices-in-home

The point here is one I touched on in the discussion concerning the regulation, namely that solicitation includes not only the end of securing a sale, but also all the necessary or proper means to that end.[24] Because a salesman's office is a reasonable means of organizing himself for the actual solicitation itself, the office is protected to the same degree the solicitation itself is protected. Thus, offices-in-home pass the statutory jurisdictional test also.

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[24]Ante at ___.

2.

Direct sales by salesmen

As a group, Wrigley salesmen in 1978 sold about $600 of gum directly to their customers -- that is, without having the sales first approved by out-of-state personnel. Under the regulation, I concluded that such sales did not create nexus because they were unusual and infrequent.

But if the statute is our sole guide, obviously here we have an immediate problem because the statute, as modified by the federal law, doesn't make any exception for unusual or infrequent direct sales. Without more, one is tempted to conclude that the direct sales may have broken the jurisdictional barrier.

However, there is a federal guidepost existing which persuades me that unusual or infrequent direct sales probably did not result in jurisdiction. A congressional subcommittee in a study of P.L. 86-272 considered "usual or frequent activity in a state by employees soliciting orders with authority to accept them" to be an

"[u]nprotected or taxable" activity.[25] (This language is identical to the Wisconsin regulation.) As applied to this case, I take this language to mean that the committee felt that unusual or infrequent direct selling was not enough to create nexus. But here is another area on which briefs on the weight to be given to this seemingly authoritative pronouncement would have been helpful.

3.

Leasing of cars

The analysis here again parallels the earlier point that a travelling salesman's car is a necessary tool of solicitation and thus the legal equivalent of statutorily-protected solicitation.[26]

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[25]The Special Subcommittee on State Taxation of Interstate Commerce of the House Judiciary Committee studied P.L. 86-272. See CCH State Tax Guide, ¶115.

[26]Ante at ___.

4.

Advertising

No one can seriously maintain that advertising is something fundamentally different from solicitation. In fact, it really is solicitation itself. Advertising is "any oral, written, or graphic statement made by the seller in any manner in connection with solicitation of business * * *."[27]

5.

Miscellaneous activities

The last activities we consider are the same we considered in the earlier discussion of miscellaneous activities--the salesmen's replacement of stale gum, maintenance and location of display cases, the keeping of a stock of gum, display racks, and promotional literature, one salesman's rental of storage space for such supplies,

[27] *Black's Law Dictionary*, Fifth Ed. at 50.

one regional manager's holding of annual sales meetings in his home and one meeting in a hotel and his intercession in credit disputes, and both regional managers' supervision of their salesmen.

As I noted earlier, all of these activities are by nature either an integral part of solicitation itself or are sales tools designed to directly enhance solicitation. As such, none of them should be regarded as falling within the jurisdictional orbit of our statute.

For example, Mr. Kroyer's "credit activities" were really just an incident of solicitation. His credit activities had nothing whatever to do with granting or denying credit or collecting on delinquent accounts. His sole connection with credit was his intervention in credit disputes to protect future sales -- something any good salesman would go. To contend that Kroyer's credit activities served to take away Wrigley's immunity is to punish an employer for having a conscientious employee.

Likewise, the supervisory duties of the regional managers were a necessary part of the solicitation.

Salesmen are, it is true, an independent lot usually capable of finding prospects on their own. But free spirits, left totally free, are almost always less effective than when there is some modicum of order imposed. A sales manager serves that order, giving operations a gravitational pull that creates cohesion in a galaxy of resplendent sales stars.

To say that the credit activities or the management or any of the other sales tools listed above are not part of protected salesmanship is to maintain that saws are not part of carpentry, that medicine is not part of doctoring, that briefs are not part of lawyering -- and that imperiousness is never a part of dissenting opinions.

In sum then, I would have ordered further briefing on whether the regulations represented our jurisdictional rules, and, if not, what were our jurisdictional rules and what was the effect of the congressional study on our statute. In the absence of that briefing, I am compelled to

dissent on the grounds that neither the regulations, nor the statute, gave the state taxing jurisdiction.

Submitted by:

/s/ Douglass H. Bartley
Douglass H. Bartley, Commissioner

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

WILLIAM WRIGLEY JR., CO.,

Petitioner-Respondent,

vs.

MEMORANDUM DECISION AND ORDER

Case Nos. 86-CV-6679
86-CV-6796

WISCONSIN DEPARTMENT OF REVENUE,

Respondent-Petitioner.

William Wrigley, Jr., Co: (hereafter Wrigley) petitioned in Case No. 86CV6796 for judicial review of a decision of the Wisconsin Tax Appeals Commission (hereafter Commission) which upheld the franchise tax assessment of the Wisconsin Department of Revenue (hereafter DOR) for the years 1973 through 1978. In companion Case No. 86CV6679, DOR petitioned for judicial review of that portion of the Commission's decision which determined that interest on the taxes found due should be calculated

at the simple interest rate under Wis. Stat. 71.09(5)(a) rather than the higher delinquent interest rate under Wis. Stat. 71.13(1)(a). Since both cases arise from the same Decision and Order of the Commission and both have been fully briefed, this Decision will address both matters.

Wrigley challenges the Commission's Order on three grounds: (1) that the failure of the Commission to involve the member who presided at the two-day evidentiary hearing in making its decision violated Wrigley's constitutional right to due process and its statutory rights; (2) that the Commission's decision is not supported by substantial evidence; and (3) that the Commission's decision rests on an improper interpretation or application of controlling law.

The pertinent and undisputed sequence of events relating to Wrigley's first challenge revolves around Commissioner William B. Smith. He was assigned to preside over the hearing held on August 26-27, 1985 and did so. Due to legislative action, his term on the Commission expired in October of 1985. A transcript of the

hearing was prepared and available to the full Commission in reaching its decision. However, the record contains no indication that Smith ever prepared proposed findings of fact, conclusions of law or decision in the case, ever reported to the full Commission regarding the hearing or was ever consulted in any fashion prior to the Commission's entry of its Order of November 18, 1986.

The Supreme Court of Wisconsin has said, "Where credibility of witnesses is at issue, it is a denial of due process if the administrative agency making a fact determination does not have the benefit of the findings, conclusions, and impressions of the testimony of each hearing officer who conducted any part of the hearing." (citations omitted) *Shawley v. Industrial Comm.*, 16 Wis. 2d 535, 541-2 (1962). Here it is undisputed that the Commission did not have the benefit of Commissioner Smith's impressions in making its fact determinations, and thus the crux of the due process challenge is whether the credibility of any witness was at issue in making any material fact determination.

Here Wrigley points to several factual findings in the Commission's Decision and Order where it contends witness credibility was an issue. The only one where this contention is clearly sustained is with respect to the finding of fact at page 10 of the Commission's Decision and Order: "On occasion, several times per year, the regional sales manager interceded in credit matters when a good account was involved." There can be little doubt that this factual determination was material to the Commission's Decision and Order. While the Conclusions of Law relate only the general statement that "The ongoing business activities of (Wrigley) . . . during the years 1973 through 1978 exceeded the 'soliciation of orders' protected by 15 U.S.C. 381 (P.L. 86-272)", the Opinion which explains this conclusion states with reference to the involvement in credit transactions by the regional manager, "This alone exceeds the 'solicitation of orders.'" The determination of whether a foreign corporation's Wisconsin business activities go beyond only the solicitation of orders must be made on a case by case basis. While a single non-immune

activity may form the basis for concluding that the minimum "nexus" with Wisconsin exists, the New Jersey Tax Court decision on which DOR relies so heavily pointed out,

> "Although it may logically be argued that each of Ringgold's activities taken individually may not warrant the conclusion that plaintiff exceeded the minimum threshold established by Sec. 381, *collectively*, plaintiff's activities demonstrate taxable presence." (emphasis added) *Ringgold Coal Mining Co. v. Taxation Div. Dir.*, N.J. Tax Rptr. (CCH) 201-011 (April 29, 1982), 10411.

This court does not here attempt to say that the Commission would or should have reached the opposite conclusion of law on the "nexus" question in the absence of the finding concerning the involvement in credit transactions. Instead, all that is being said is that this factor is one that formed some part of the basis for the Commission's conclusion and that its absence may have permissibly led the Commission to decide the question otherwise. This is further supported by the fact that this factor was the only one specifically discussed in the

Opinion, with all others merely listed. As such, the factor is material.

The only evidence in the record to support the Commission's finding on credit transaction involvement is the testimony of the two regional managers employed by Wrigley during the period in question and the company's formal position description for the regional manager. John Kroyer, regional manager from 1973 to 1975, testified that he had two or three times per year voluntarily gotten involved in mediating a credit dispute to protect future sales to a good customer. Gary Hecht, regional manager from 1976 to 1978, testified that he had no involvement of any kind in credit transactions with Wrigley customers while he was regional manager. The company's position description recites among the "Principal Activities" of the regional manager that he "Represents the company on credit problems as necessary." The Commission's finding cited above is not qualified as to the time this activity occurred. In its Opinion, the Commission restates the essence of the finding but explicitly recites that this

activity was "carried on by it (Wrigley) during the years 1973-1978." There is nothing in the record by which the Commission could find that in 1976 to 1978 the regional manager "carried on" this activity other than to have concluded that Gary Hecht was lying. His testimony was not patently absurd nor contrary to the laws of nature so as to permit ignoring it or finding its opposite. Rather, the finding could only have made through an assessment of Hecht's credibility. To have done so without the benefit of Commissioner Smith's impressions of Mr. Hecht violates Wrigley's rights to due process.

DOR points to the position description for Hecht and seems to suggest not only that this constitutes substantial evidence to support the Commission's finding but also that this removes the issue from the realm of credibility evaluation. To the extent this argument is being made, it misses the Point. Nexus with a state is established by reference to what a company's representatives did in that state, not what they were authorized to do. It is "local activities" which support a state's taxing authority on the

interstate operations of a foreign corporation. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 452 (1959). It is also important to note that the franchise tax at issue here is imposed on an annual basis. The analysis of Wrigley's activities for qualification for the immunity of 15 U.S.C. Sec. 381 must also be done on an annual basis. *Ringgold, supra*, at 10, 412. Even if Wrigley's activities in 1973 to 1975 remove its federal immunity to state taxation, this is not a permanent removal whereby Wrigley has no opportunity to regain it by altering its practices.

Wrigley also argues that the failure of the Commission to involve Commissioner Smith violates its statutory rights. It relies principally on the requirements of Wis. Stat. 227.46(2). DOR points to the language in Wis. Stat. 73.01(4)(3), "irrespective of ch. 227", to argue that the Sec. 227.46(2) procedure is inapplicable to the Commission's decision. This court need not address the application of this Chapter 227 procedure to the Commission, for the same result urged by Wrigley is

mandated by the specific statute defining the Commission's powers and duties. Sec. 73.01(4)(b) provides,

> "Any matter required to be heard by the commission may be heard by any member of the commission or its hearing examiner and *reported* to the commission . . . (emphasis added)

There can be no serious dispute that the assessment made by DOR against Wrigley is a "matter required to be heard by the commission". In making a decision in a case before it, the Commission may act only with the concurrence of at least three of its members. The legislature has authorized the Commission to make decisions after evidentiary hearings without all members sitting through each such hearing, but has expressly conditioned this exercise of authority with the requirement that the matter be "reported" to the full commission. The meaning of this requirement can only be gleaned by looking to its purpose.

Administrative agencies are granted substantial authority to adjudge the rights of persons coming before them. In cases where factual issues are present, such as

is true here, they act as both jury and judge. As finders of fact, they are given the broad province to assess the credibility of witnesses and to determine the weight to be assigned the evidence presented. In this latter regard, the agency, as finder of fact and subject only to the standard of substantial evidence on review of its determination, is permitted to decide which of two competing inferences to draw from undisputed evidence. The importance of the fact-finder in having the benefit of viewing the demeanor of a witness in gauging credibility is reflected in the due process requirements noted in *Shawley, supra* and a line of other cases of similar vein. While this benefit in the area of assessing the weight of the evidence and in drawing inferences from it may not be of constitutional proportion, it is nonetheless still present. The demeanor of a witness taken together with the actual words used in his or her testimony may justifiably lead the finder of fact to accord greater or lesser weight to the content of what is said or to draw one inference as opposed to another. This combination of demeanor and word choice will not always

be of significance, but the point is that in some instances it may be critical.

This feature of live witness testimony is clearly unavailable to the fact-finder who does not see the witness testify. In order to offset this loss, the legislature required the next best alternative, i.e. that the testimony be reported to the non-present agency members who were to participate in the fact-finding function. At least in cases where an issue concerning the weight of the evidence and/or a question of what factual inference to draw is present, I read the statutory language to require that the presiding commission member be personally involved in reporting to the non-present members. In such cases the use of the bare transcript is not sufficient.

Reading this statutory language in this way does no violence to the efficiency of agency operations. In most instances this has been the actual practice, for the presiding commissioner will be one of those who forms the minimum of three members who make the decision and his or her reporting function will be served through that

participation. In the limited number of cases where that is not true for some reason, the personal reporting mandate is already imposed by due process concerns in instances where credibility is at issue. Where credibility is not in issue, this mandate will only apply where weight of evidence or choice of inference considerations are material. Thus the added step imposed on the Commission's proceedings by this court's reading of Sec. 73.01(4)(b) will seldom in fact be an added step at all but will be simply accomplished through the present practice. Moreover, this interpretation is consistent with the obvious purpose sought to be accomplished by the legislature through the general requirements on agency decision-making found in Sec. 227.46(2), and it is less onerous in the extent of the procedures required.

Looking to the Decision of the Commission in this case in the context of the record presented by the transcript and exhibits, there are several material findings made where the Commission was clearly called upon to assign weight or to draw inferences from the testimony. This is apparent

in the findings that Wrigley's representatives in Wisconsin for the entire period in question were "maintaining offices in (their) home" and "conducting regular and periodic training seminars in Wisconsin", amongst others. As a result the Commission, in failing to consult with Commissioner Smith, has violated Sec. 73.01(4)(b).

Having found that the Commission has violated Wrigley's due process and statutory rights, the appropriate remedy is to remand this case to the Commission. Wis. Stat. 227.57(8). Since on remand and after following the procedure outlined below, the Commission may reach a different result on the threshold question of Wrigley's immunity under 15 U.S.C. 381, no useful purpose is served by addressing whether the assessed interest is to be simple or delinquent.

For all of the foregoing reasons IT IS ORDERED:

1. That Case No. 86CV6679 is dismissed without prejudice.

2. That the Decision and Order of the Commission dated November 18, 1986 is hereby remanded to the

Commission for further proceedings not inconsistent with this decision. At the least, the Commission shall consult personally with Mr. Smith concerning his impressions of the credibility of the witnesses and the weight to be accorded their testimony. The decision issued by the Commission after such consultation shall affirmatively describe the procedures used to meet these directions.

Dated this 20th day of August, 1987.

BY THE COURT:

Michael Nowakowski
Michael Nowakowski,
Circuit Court Judge

STATE OF WISCONSIN

TAX APPEALS COMMISSION

WILLIAM WRIGLEY JR. COMPANY Wrigley Building 410 North Michigan Avenue Chicago, IL 60611 Petitioner, vs. **WISCONSIN DEPARTMENT REVENUE OF** P.O. Box 8933 Madison, WI 53708 Respondent.	DOCKET NO. I-8591 **DECISION AND ORDER** (Drafted by Commissioner Timken)

The above-entitled matter came on to be heard by this Commission; the petitioner, William Wrigley Jr. Company, appeared by its counsel, Barbara J. Janaszek and Paul Pakalski, of the law firm of Whyte & Hirschboeck, S.C.; the respondent, Wisconsin Department of Revenue, appeared by its counsel, James L. Greenwald.

After considering the testimony, evidence and briefs of counsel, this Commission hereby finds and decides as follows:

-FACTS-

The William Wrigley Jr. Company (Wrigley) is an Illinois corporation, headquartered in Illinois, which manufactures and sells various chewing gum products throughout the United States.

The dollar volume of Wrigley's sales in Wisconsin during the years involved was as follows:

1973	-	$2,797,055
1974	-	$3,184,703
1975	-	$3,898,041
1976	-	$4,025,372
1977	-	$4,091,568
1978	-	$4,392,202

In the assessment hereunder review the respondent, Wisconsin Department of Revenue (DOR), apportioned the

following income to Wisconsin for franchise/income tax purposes:

1973	-	$ 86,663
1974	-	$ 90,185
1975	-	$316,069
1976	-	$379,475
1977	-	$342,429
1978	-	$443,374

Wrigley did not file Wisconsin corporate franchise/income tax returns or pay any taxes to Wisconsin for the years 1973-1978. It did file in its home state of Illinois and in those states where it had offices and/or manufacturing facilities.

Because Wrigley had not filed or paid taxes in Wisconsin the DOR, on October 6, 1980, issued a franchise tax assessment against it in the total amount of $246,641.04 covering the years 1973-1978. Said assessment included a late filing penalty, a negligence penalty and delinquent interest.

Wrigley petitioned the DOR for redetermination on the grounds that (a) Wrigley did not engage in business within the State of Wisconsin in a manner sufficient to subject it to the taxing jurisdiction of the State of Wisconsin under Wis. Adm. Code Sec. Tax 2.82, and that Wrigley was protected from Wisconsin income tax liability by federal law, P.L. 86-272, 15 U.S.C. Sec. 381 ("P.L. 86-272") and the United States Constitution; and (b) the assessment of delinquent interest and negligence penalties violated both Wisconsin's tax code and the DOR's regulations. On September 3, 1981, the respondent denied the petition for redetermination.

On October 21, 1981, the petitioner filed a timely appeal of the respondent's action with this Commission, objecting to the assessment of franchise taxes, interest and penalties again on the grounds that its activities within the State of Wisconsin constitute the mere solicitation of business and hence are protected from Wisconsin's franchise tax jurisdiction by federal law, to wit, P.L. 86-272, (15 U.S.C. Sec. 381) and that the petitioner

lacks sufficient "nexus" with the State of Wisconsin to subject it to Wisconsin's franchise tax.

The respondent DOR, in its brief filed with this Commission on April 9, 1986, at pages 7 & 8 "concedes that Wrigley's non-filing of returns and declarations of estimated tax was due to reasonable cause and not due to willful neglect, since it did not file upon the advice of counsel that Wrigley was exempt from taxation by Wisconsin under federal law . . . and that the evidence shows that the figures used by the respondent in the computation of the property factor in the apportionment formula should be modified in the assessment notice . . . to show that each employe maintained on average a supply of chewing gum valued at $1,000 and promotional literature valued at $200".

Wrigley sells its gum products nationwide through a sales staff comprised of field representatives, key account managers, regional sales managers and district managers. During the 1973 to 1978 period Wrigley had 7 or 8 geographical sales districts in the United States. At that

time its Chicago based Midwestern District was comprised of Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, and parts of Iowa, and the Upper peninsula of Michigan. The Wisconsin sales region of the Midwestern District was managed by a regional manager who lived in Wisconsin along with 4-5 sales representatives who lived in Wisconsin and were each responsible for a geographic territory within the State.

During 1973-1976, two of these sales representatives worked exclusively in territories within the boundaries of Wisconsin, one spent a portion of his working time in various Upper Michigan counties, and another spent approximately one-third of his working time in the State of Iowa. In addition one representative, who resided in Minnesota, worked in some of the western counties of Wisconsin which were included in Wrigley's Minnesota region. In 1977 the boundaries of the Wisconsin region were redrawn. Certain southern Wisconsin counties became part of the Peoria, Illinois region and were handled by a sales representative who lived in Illinois, and certain

western Wisconsin counties became part of the Iowa region and were handled by a sales representative living in Iowa.

The entire Midwestern District was the responsibility of a district manager who lived in the Chicago area. During the period involved Wrigley did not utilize key account managers in Wisconsin, that function being performed by the regional sales manager. Because the purchase of chewing gum by the consumer is usually based on impulse rather than a pre-planned shopping list, the display, location and maintenance of the product is primary and those functions are performed by Wrigley's sales representatives. Each of the representatives who solicited sales in Wisconsin was responsible for approximately 700 indirect and 30-50 direct accounts. A direct account was typically a wholesaler or large chain, an indirect account a grocery store.

During the period in dispute, each sales representative received from Wrigley a leased vehicle, usually a station wagon, and a supply of gum, display racks and promotional literature. The gum was carried on Wrigley's books as

inventory, the display racks were not, as they were given away to the accounts served. The gum, display racks and promotional literature were kept in the representative's home except for one representative who received special permission to rent storage space at Reynolds Transfer and Storage, in Madison. Each sales representative was reimbursed by his employer for business expenses connected with the automobile and for overnight lodging, meals and long distance telephone calls.

Each sales representative spent the large majority of his time calling on customers or potential customers in an effort to sell Wrigley's products. During a typical call to an indirect retail account, the sales representative would survey the display of Wrigley gum products and its package and flavor distribution, check the products for freshness, replacing stale gum if necessary, and make a sales presentation regarding a particular Wrigley promotion or the need to modify distribution or display of Wrigley products.

The formal position description of the sales representative is as follows:

WM. WRIGLEY JR. COMPANY

Position Description

INCUMBENT:		POSITION:	Field Representative
REPORTS TO:	Regional Manager	UNIT:	Field
DATE:	July, 1978	DEPARTMENT:	Sales

FUNCTION

This position is responsible for the implementation and maintenance of sales levels for an established sales territory based on the merchandising plan of the Wm. Wrigley Jr. Company. Develops and keeps current relations with assigned headquarters and wholesale accounts to provide service and discuss methods for improving distribution.

NATURE AND SCOPE OF PRINCIPAL ACTIVITIES

Wrigley brands of chewing gum have a wide appeal throughout the United States and enjoy general acceptance by retailers as profitable, high turnover merchandise which their customers expect to find and purchase in supermarkets, variety stores, mass merchandise stores, convenience stores, drug stores, restaurants, theaters, concession stands, news stands, vending machines, and other types of outlets. The demand for Wrigley's gum by consumers is based on a quality product which is pre-sold

by a continuing advertising program in the most effective media.

Although Wrigley products provide a generous mark-up for retailers, the modest unit selling price makes volume the key to real profits. Chewing gum is usually purchased on impulse. In order to merchandise the advertising and achieve desired volume, retailers require guidance to attractively display and promote Wrigley brands. In addition, adequate inventories of fresh chewing gum and supporting point-of-purchase materials are required at certain in-store locations where consumers will most likely respond to impulse. The number and type of displays used will vary according to the specific merchandising needs of each outlet.

The Field Representative is expected to be completely familiar with the territory assigned and the retail outlets located within that area. Good communication lines must be established with all key store personnel, e.g., store managers, buyers and department managers, in order to provide assistance with ordering and keeping accounts up-to-date. All stock must be checked for freshness and appearance to ensure superior image of the Wrigley product line. Point-of-purchase materials and brand-identification-plates must be kept in good condition, as well. The incumbent should strive toward permanent placement of new packaging and supplemental displays, as well as presentations of new products and should constantly be on the lookout for new outlets, or additional distribution avenues. Since this representative also calls on assigned headquarters and direct accounts, contact with retail stores is essential to enable retailer's problems to be discussed with those who distribute the products.

Wrigley brands are usually distributed to retailers through organizations known as direct accounts. These include chain stores, mass merchandisers, cooperatives and voluntary buying groups, wholesalers, vendors, franchise

operators, restaurant suppliers, cash and carry operators, and others. A thorough understanding of Wrigley marketing and merchandising policies is necessary as this position makes headquarters and wholesale calls to assigned direct accounts from the above categories. Through carefully prepared and well understood presentations, the incumbent is expected to influence the merchandising and buying decisions relating to Wrigley products, promotions, and market impact. Decisions made at this level can affect turnover in stores beyond the incumbent's territory and can significantly affect the distribution of Wrigley brands. Besides remaining current with Wrigley marketing data, the incumbent should know competitive products, policies, current strategies, prices, and influence on the chewing gum market. Field representatives must be in a position at all times to know exactly where the Wrigley products stand in relation to competition.

This position serves as the watchdog of the Company in the market place, observing, listening, and being sensitive to any changes or developments affecting the Wrigley Company, its products, or marketing program. Additionally, all daily reports should be completed on a timely basis and channeled to the Regional Manager as required. Properly maintained retail store and account books are a necessity as well as keeping current all accounts in payment of invoices. Due to the fact that field representatives are, for the most part, the sole direct contact that individual customer accounts have with the Wrigley Company, it is essential that the individual field representatives present themselves in a neat, polite, and professional manner to ensure that the Company image and reputation are maintained at the highest level. Field Representatives attend periodic training classes and refresher sessions at the sales training center in Schaumburg, Illinois, as well as in-field training programs.

ACCOUNTABILITY

This position is accountable for the development, implementation and maintenance of sales levels for the assigned sales territory. Approximate sales volume per territory totals $250,000 to $500,000 per year.

PRINCIPAL ACTIVITIES PERFORMED BY THE INCUMBENT

1. Call on retail outlets in an assigned territory according to a pre-determined schedule.

2. Make assigned calls on headquarters and direct accounts on a timely basis and develop effective rapport with all members of the respective management groups.

3. Establish and maintain effective relations with district managers of all multiple store operations in assigned territory.

4. Ensure that retailers have adequate inventories of all brands and pack sizes permitting them to effectively display and promote Wrigley brands of chewing gum.

5. Set up displays and promote merchandise with point-of-purchase materials in stores as necessary.

6. Carry out all activities in a neat, polite, and highly professional manner.

7. Keep current all reports, correspondence, and accounts receivable and exercise reasonable care with all property assigned and responsible for.

BWLeonard:dk
July, 1978

The majority of sales were made in the following manner: Direct accounts would submit their orders to Wrigley's office in Illinois for approval or rejection and then Wrigley would ship the gum to the direct account by common carrier. Occasionally, on the average of once a month, sales representatives would erect a display stand in an indirect account's (retailer's) store and stock it from his supply of sample gum. He would then report the transaction to Wrigley's Chicago office by "agency stock check" who would then bill the retailer's wholesaler, who would in turn bill the retailer. The average retail value of the gum transferred in such a transaction ranged from between $8 to $16.

Although the sales representative played no direct role in the credit worthiness of his customers, he did routinely receive copies of any credit type letters sent by his employer.

The first regional manager employed by Wrigley during the years 1973-1978 resided in Wisconsin, maintained a business office in the basement of his home

and held yearly training sessions there. He kept his files in a company issued file cabinet as well as a supply of gum, display racks and promotional literature. He did not receive reimbursement from Wrigley for the use of a portion of his home for an office but did claim income tax deduction for it. He also held a training session at a local hotel.

A primary function of the regional manager was to measure sales within his region. To this end, he expended over 80% of his time in the field, often with the sales representatives who he supervised. Since Wrigley had no key account managers assigned to Wisconsin the regional manager handled these accounts, which included the Kohl's and Sentry food stores and the vending machine trade. In addition to his direct sales work the regional manager also screened and recommended the hiring and firing of sales representatives, reviewed sales reports, conducted sales meetings, evaluated the performance of his sales representatives, and recommended the amount of their periodic raises, supervised the on-the-job training of

newly hired sales representatives, reapportioned sales districts, when necessary, and substituted for sick sales representatives.

On occasion, several times per year, the regional sales manager interceded in credit matters when a good account was involved.

The regional manager was also reimbursed for business expenses including overnight lodging, meals and long distance telephone calls.

The formal position description of the regional sales manager is as follows:

WM. WRIGLEY JR. COMPANY

POSITION DESCRIPTION

INCUMBENT:		POSITION:	Regional Sales Manager
REPORTS TO:	Area Sales Manager	GROUP:	Domestic
DATE:	September, 1979	UNIT:	Marketing
		DEPARTMENT:	Sales

FUNCTION

Manages the sales activities and supervises the assigned regional field representatives in carrying out the company's merchandising effort to increase sales in the region. Develops and maintains effective communications with headquarters offices located in the region.

NATURE AND SCOPE OF ACTIVITY

The Sales Department field force merchandises Wrigley's chewing gum throughout the 50 states of the United States. The country is divided into 10 areas and further divided into 56 regions. Each area is headed by an area sales manager who directs the activities of four to eight regional managers within his district. A Regional Sales Manager supervises five to ten field representatives who call on retail, wholesale, and chain accounts for the company.

The incumbent is primarily concerned with the management of the regional field force to increase sales in the region. The objective is to achieve increased distribution, display, and promotion of Wrigley brands of chewing gum in order to gain total effectiveness from the company's advertising effort.

The management of the region's field force by the incumbent includes recruiting of representatives, and actively participating with the district manager in the selection, orientation, field training, evaluation, promotion, compensation, and reassignment of the region's field representatives. Due to the high level of competition in the chewing gum market, it is especially important that the field representatives be highly skilled in up-to-date and effective sales techniques. Each field representative attends special training classes on a scheduled basis at the Wrigley Sales Training Center for field personnel, located in Schaumburg, Illinois. These training classes are

designed to acquaint the field personnel with all aspects of the company's operations and more specifically to instruct, train, and sharpen individual sales skills. The regional manager is responsible for continually evaluating the work of each field representative in the region and further developing their skills in dealing with the individual accounts.

In addition to the large number of retail accounts and chain outlets, which are primarily serviced by the field representatives, the incumbent maintains and develops sound business communications with the headquarters of one or more major drug, variety, grocery, and other chains located in the region leading to increased sales. He also maintains communications with vendors, wholesalers, and distributors operating in the region. These communications help him to assure that the Wrigley Company is in a position to take advantage of all opportunities in the retail outlets concerned. The Regional Sales Manager may present and secure the account approval for special promotions by a major direct account with stores located in other regions.

In addition to these management and merchandising responsibilities, the Regional Sales Manager prepares periodic reports analyzing the sales of the various Wrigley products in the region, and makes follow-up recommendations to the district sales manager concerning possible merchandising programs which could be implemented in the region to increase sales.

ACCOUNTABILITY

This position is accountable for the effective management of all sales activity and the attainment of established sales goals in a region with annual sales ranging between $2 million and $10 million with a field budget of $200,000 per year.

PRINCIPAL ACTIVITIES PERFORMED BY THE INCUMBENT

1. Devises and implements regional business-building efforts, solutions to current sales issues or new methods for developing the Wrigley franchise in his region.

2. Regularly calls on direct accounts to develop plans and strategies for increasing sales of Wrigley brands.

3. Accompanies field representatives on sales calls to further train and to improve individual sales skills and motivation.

4. Evaluates competitive sales-related activities in the region and reports developments to the area manager.

5. Manages five to ten field representatives. Trains new field representatives and improves skills and motivations of established representatives.

6. Calls on retail outlets to appraise the performance of the field representatives.

7. Represents the company on credit problems as necessary.

8. Assures that all company cars and property in the region are maintained in proper condition.

9. Screens prospective direct accounts and recommends action to be taken.

WORK RELATIONSHIPS

1. Works with the Assistant Vice President - Sales Services to provide statistical support regarding field data and receive advice on personnel matters.

2. Works with the Sales Training Manager to assure the timely and effective communication of proper sales and merchandising techniques to assigned managers and representatives.

3. Works with the Merchandising Manager to assure the effective use of display materials and to recommend and provide merchandising applications based on input from the field.

JLMarnul:Analyst
January, 1980

The district manager for Wrigley's Midwestern District during the period under review was officed in a suburb of Chicago. He bore the ultimate decision making responsibility for all sales and personnel matters arising in the Midwestern District.

The formal position description of the district manager is as follows:

WM. WRIGLEY JR. COMPANY

POSITION DESCRIPTION

INCUMBENT:		POSITION:	Area Sales Manager
REPORTS TO:	General Sales Manager	GROUP:	Domestic
DATE:	June, 1979	UNIT:	Marketing
		DEPARTMENT:	Sales

DEPARTMENT: Sales

FUNCTION

Directs the activities of the field sales staff in an assigned area in the attainment of established sales goals through the use of effective marketing, merchandising, and promotional programs.

NATURE AND SCOPE OF ACTIVITIES

The Sales Department field force merchandises Wrigley products throughout the 50 United States. The country is divided into 10 areas and further divided into a total of 56 regions. A typical area consists of an area manager, and four to nine regional managers who each supervise from four to ten field representatives. The incumbent maintains an office staffed with clerical personnel. The area field organization cultivates and services from 1,000 to 2,000 direct accounts, and 15,000 to 30,000 Class "A" retail outlets. Accounts are assigned to field representatives for

reviewing with each representative regularly calling on 600-800 of these outlets under the supervision of a regional manager.

The Area Manager personally, and through key account managers, establishes and maintains effective relations with key offices of major chains and wholesalers in the district because of their importance to our business. Incumbent may also supply additional coverage to regional manager or representative assigned accounts.

In all account relations, particular emphasis is placed on the maintenance of adequate and balanced stocks, and the effective use of company developed sales aids and promotions for stimulating impulse buying at point of purchase.

Display units and related merchandising materials are prepared, developed and procured at the general sales level. However, the Area Manager and field staff, because of experience and knowledge of market needs, contribute significantly to this development.

Actual selling is accomplished through a continuing advertising campaign aimed directly at the ultimate consumer. The field sales organization ensures the products are readily available at the various distribution outlets to meet the demands of the premotivated consumer. Continuous feedback is provided to the general sales offices and other Area Managers on all trends and developments that can affect the sale of products. This feedback may involve specific departments such as:

Sales - in regard to competitive practices and market position

Advertising - in regard to consumer reaction and effectiveness of promotions

Traffic - in regard to shipping delays

Credit - in regard to an account's financial status

The Area Manager, through the regional managers, builds a competent and enthusiastic field-sales force. Field representatives are generally hired by the regional manager in the local territory within salary and staffing levels established by the general sales office. They receive a salary, and are provided with a company car and are reimbursed for business and travel expenses. Some newly hired representatives may be mature with extensive experience, but usually they are younger people with limited merchandising experience. This requires an intensive training program in Wrigley merchandising methods, which is carried out at the Wrigley Sales Training Center after an orientation and training program in the field.

ACCOUNTABILITY

In broadest terms, this position is responsible for increasing the turnover rate and sales. Also, this position is accountable for recommending sales goals consistent with Wrigley marketing policy and the attainment of approved sales goals in the area through the effective implementation of marketing and merchandising programs. Average annual sales for an area total $16 million. Average annual field force budget for an area totals $1.1 million.

PRINCIPAL ACTIVITIES PERFORMED BY THE INCUMBENT

1. Devises and implements district business-building efforts, solutions to current sales issues or new methods for developing the Wrigley franchise in his region.

2. Personally maintains contact with key or problem accounts to monitor the market or to assist in account relations which require attention at the area manager level.

3. Analyzes monthly basic and major trade area tabulation to evaluate sales trends to determine the effectiveness of the personnel in the area.

4. Maintains and develops a competent field sales force through proper selection, orientation and field training, and deployment of personnel.

5. Travels throughout the area in order to work with and evaluate the effectiveness and progress of regional managers and field representatives.

6. Maintains effective communication between the general sales office and the field on all operational matters and product promotions.

7. Plans and directs promotional activity for the area.

8. Manages controllable expenses within approved budget.

9. Assures the conduct of business is within Wrigley policy and procedures.

10. Reviews expense accounts to assure that field staff are following reasonable and proper standards within company policy.

WORK RELATIONSHIPS

1. Works with the Assistant Vice President - Sales Services to provide statistical support regarding field data and receive advice on personnel matters.

2. Works with the Sales Training Manager to assure the timely and effective communication of proper sales and merchandising techniques to assigned managers and representatives.

3. Works with the Merchandising Manager to assure that effective use of display materials and to recommend improved merchandising applications based on input from the field.

JLMarnul:Analyst
January, 1980

Wrigley is not and never has been licensed to do business in Wisconsin. It has never had a bank account in the State and has not invoked the jurisdiction of a Wisconsin court. At no time has Wrigley owned or leased real estate or operated a manufacturing or warehouse facility here.

Wrigley's credit department in Chicago possessed the sole discretion as to whether credit was to be granted to a customer and virtually all credit transactions were handled

there. All payments for Wrigley products were mailed directly to Chicago and it was Wrigley's credit department which followed up on delinquent accounts.

During the years 1973-1978, Wrigley purchased extensive advertising on television and radio programs in Wisconsin and in newspapers printed and sold in Wisconsin. Newspaper advertising included the printing of a coupon, which the reader could clip out to receive a special premium or to purchase gum from a retailer at a reduced price. In 1973, 1974 and 1975, Wrigley purchased spot television and radio advertising in Green Bay, La Crosse, Madison and Milwaukee. In 1976, it purchased spot television advertising in the same cities and also in Wausau. In 1977 and 1978, it purchased spot television advertising only in Milwaukee.

The issues left for this Commission to determine in the order of their relative importance are:

Whether the business activities of Wrigley in the State of Wisconsin during the years 1973 through 1978 constituted doing business in Wisconsin

within the intent and meaning of Sec. 71.01(2), Wisconsin Statutes, in excess of the "solicitation of orders" protected by P.L. 86-272; and

Whether the tax assessed, if found to be due, is subject to delinquent or simple interest, and whether the $10 late filing penalty was properly imposed.

-CONCLUSIONS OF LAW-

The ongoing business activities of the William Wrigley Jr. Company in the State of Wisconsin during the years 1973 through 1978 exceeded the "solicitation of orders" protected by 15 U.S.C. 381 (P.L. 86-272).

The petitioner had "nexus" with the State of Wisconsin and its income for the years 1973 through 1978 was subject to apportionment and taxation by the State of Wisconsin, within the intent and meaning of Sec. 71.01(2) of the Wisconsin Statutes.

The $10 late filing penalty contained in Sec. 71.11(40) of the Wisconsin Statutes is mandatory and not subject to review by this Commission.

Due to the provisions of Sec. 71.13(2) of the Wisconsin Statutes, the taxes due hereunder are subject to the interest rates contained in Sec. 71.09(5)(a) of the Wisconsin Statutes, not the delinquent interest rates imposed by Sec. 71.13(1) of the Wisconsin Statutes.

Therefore,

IT IS HEREBY ORDERED

That the respondent's action on petitioner's petition for redetermination be and the same is hereby modified to reflect the above Findings and Conclusions.

Dated at Madison, Wisconsin, this 18th day of November, 1986.

WISCONSIN TAX APPEALS COMMISSION

/s/ John P. Morris
John P. Morris, Chairperson

/s/ Thomas R. Timken
Thomas R. Timken, Commissioner

/s/ Catherine M. Doyle
Catherine M. Doyle, Commissioner

/s/ Mary Wagner-Malloy
Mary Wagner Malloy, Commissioner

(Concurs in part, Dissents in part)
Robert C. Junceau, Commissioner

pc: Petitioner
Representative
Respondent

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"

STATE OF WISCONSIN

TAX APPEALS COMMISSION

****

WILLIAM WRIGLEY JR. COMPANY

Petitioner,

vs.

WISCONSIN DEPARTMENT REVENUE OF

Respondent.

DOCKET NO. I-8591

OPINION

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The question of nexus and the protection afforded under Public Law 81-272 (15 U.S.C. 381) is of growing concern to Wisconsin and the companies who sell their products here. Public Law 82-272 restricts a state from imposing a net income tax on income derived within its borders from interstate commerce if the only business activity of the taxpayer within the state consists of the solicitation of orders for sales of tangible personal property, which orders are to be sent outside the state for acceptance or rejection and, if accepted, are filled by shipment or

delivery from outside the state. This provision of our federal law provides as follows:

15 United States Code §381

(a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) The solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

The provision of the Wisconsin Statutes which imposes a franchise tax on corporations doing business in Wisconsin is Sec. 71.01(2), which states:

Section 71.01(2), Wisconsin Statutes

(2) For the privilege of exercising its franchise or doing business in this state in a corporate capacity . . . , every domestic or foreign corporation . . . shall annually pay a franchise tax according to or measured by its entire net income of the preceding income year . . . .

The provisions of the Wisconsin Administrative Code which are relevant to this proceeding are as follows:

Tax 2.82(1)(b), Wisconsin Administrative Code

(b) A residence of an employe or representative is not ordinarily considered a business location of the employer unless the facts indicate otherwise. It could be considered a business location under one or more of the following conditions: . . . the employe uses supplies, equipment or samples furnished by the employer; or the space is used by the employe to . . . hold sales meetings . . . .

Tax 2.82(4), Wisconsin Administrative Code

(4) WHAT CONSTITUTES "NEXUS."

(a) Factors. If a foreign corporation has one or more of the following activities in Wisconsin, it is considered to have "nexus" and shall be subject to Wisconsin franchise/income taxes:

1. Maintenance of any business location in Wisconsin, including any kind of office.

* * *

5. Usual or frequent activity in Wisconsin by employes or representatives soliciting orders with authority to accept them.

6. Usual or frequent activity in Wisconsin by employes or representatives engaged in a purchasing activity . . . .

* * *

8. Miscellaneous other activities by employes or representatives in Wisconsin . . . .

9. Leasing of tangible property . . . for use in Wisconsin.

NEXUS VS. P.L. 86-272

The question of when a business has stepped across the line and lost the protection afforded by P.L. 86-272 is factual and must be determined on a case by case basis.

In response to the growing state and national concern and confusion in this area, the Multistate Tax Commission (MTC) on June 21, 1985 passed Resolution 1985-4 which established the following guidelines which this Commission finds helpful and hereby adopts:

-SOLICITATION OF ORDERS-

For the in-state activity to be immune, it must be limited solely to solicitation. If there is any other activity unrelated to solicitation the immunity is lost. Examples of

activities which are immune or non-immune are as follows:

A. Immune Activities.

1. Advertising campaigns incidental to missionary activities.

2. Carrying samples only for display or for distribution without charge or other consideration.

3. Owning or furnishing autos to salesmen.

4. Passing inquiries and complaints on to home office.

5. Incidental and minor advertising, i.e., notice in newspapers that a salesman will be in town at a certain time.

6. Missionary sales activities.

7. Checking of customer's inventories (for re-order, but not for other purposes).

8. Maintaining sample or display room for two weeks (14 days) or less during the tax year.

9. Soliciting of sales by an in-state resident employee of the taxpayer; provided the employee maintains no in-state sales office or place of business (in home or otherwise).

B. Non-Immune Activities.

The following in-state activities will cause otherwise immune sales to lose their immunity:

1. Making repairs or providing maintenance.

2. Collecting delinquent accounts.

3. Investigating credit worthiness.

4. Installation or supervision of installation.

5. Conducting training courses, seminars or lectures.

6. Providing engineering functions.

7. Handling customer complaints.

8. Approving or accepting orders.

9. Repossessing property.

10. Securing deposits on sales.

11. Picking up or replacing damaged or returned property.

12. Hiring, training or supervising personnel.

13. Providing shipping information and coordinating deliveries.

14. Maintaining samples or display room in excess of two weeks (14 days) during the tax year.

15. Carrying samples for sale, exchange or distribution in any manner for consideration or other value.

16. Owning, leasing, maintaining or otherwise using any of the following facilities or property in-state:

a. Repair shop
b. Parts department
c. Purchasing office
d. Employment office
e. Warehouse
f. Meeting place for directors, officers or employees
g. Stock of goods
h. Telephone answering service
i. Mobile stores, i.e., trucks with driver salesmen
j. Real property or fixtures of any kind

17. Consigning tangible personal property to any person, including an independent contractor.

18. Maintaining, by either an in-state or an out-of-state resident employee, of an office or place of business (in home or otherwise).

19. Conducting any activity which is not an integral part of the solicitation of orders.

When applying these guidelines to the matter before us, we are compelled to conclude that Wrigley did indeed cross the line and lost the protection afforded in 15 U.S.C. 381 or P.L. 86-272 due to the following non-immune

activities carried on by it during the years 1973-1978 in the State of Wisconsin:

- replacement of stale gum
- maintaining product displays both as to location design and content
- direct sales of gum by use of "agency stock checks"
- maintaining offices in home
- conducting regular and periodic training seminars in Wisconsin
- recommending hiring, firing and raises of sales representatives in Wisconsin by regional manager
- involvement in credit transactions by regional manager
- training and supervising sales representatives by regional sales manager
- rental of storage space in Madison, Wisconsin
- the purchase of non-incidental advertising in Wisconsin

A perusal of the position description of the Regional Manager is helpful. Although increasing sales volume was obviously the primary goal of all of Wrigley's employees in Wisconsin, the regional manager also performed other important managerial and supervisory functions, all within the confines of the State. One of his listed principal activities was to "represent the company on credit problems as necessary". Although petitioner attempted to minimize this responsibility at the hearing before this Commission, its regional manager testified that "a couple, three times a year" he mediated credit problems between a very good account and his credit department in Chicago. This alone clearly exceeds the "solicitation of orders".

On balance, the considerable activities of Wrigley in the State of Wisconsin during the years 1973 through 1978 transcended the solicitation of orders protected by P.L. 86-272 irregardless of whether the DOR or Wrigley had the burden of proof to show it.

SUPPORTING CASE AUTHORITY

Miles Laboratories v. Department of Revenue, 546 P 2d 1081 (1976)

The Drackett Products Co. v. Conrad, N.D. Sup.Ct., N.D. Tax Rptrs. ¶200-316 (1985)

Milwaukee Seasoning Laboratories, Inc. v. Wisconsin Department of Revenue, WTAC, Wis. Tax Rptr. ¶202-652 (1986)

Grande Cheese Company v. Wisconsin Department of Revenue, WTAC, Wis. Tax Rptr. ¶202-259 (1985)

Avon Products, Inc. v. Wisconsin Department of Revenue, WTAC, Docket No. I-8494 (March 14, 1986)

Ministers Life & Casualty Union v. Haase, 30 Wis. 2d 339 (1966)

DELINQUENT VS. SIMPLE INTEREST

Section 71.09(5)(a) of the Wisconsin Statutes provides for simple interest.

Section 71.09(5)(a), Wisconsin Statutes

(5)(a) In assessing taxes interest shall be added to such taxes at 12% per year from the date on which such taxes if originally assessed would have become delinquent if unpaid, to the date on which such taxes when subsequently assessed will become delinquent if unpaid. (See Footnote[1])

Section 71.13(1) of the Wisconsin Statutes provides for delinquent interest.

Section 71.13(1), Wisconsin Statutes

71.13 **Collection of delinquent taxes.**

(1)(a) Income and franchise taxes shall become delinquent if not paid when due under sec. 71.10(9), and when delinquent shall be subject to interest at the rate of 1.5% per month until paid . . . .

Section 71.13(2) of the Wisconsin Statutes provides as follows:

Section 71.13(2), Wisconsin Statutes

(2) Any additional income or franchise tax assessment contested before the tax appeals commission or in the courts, which is finally determined to be correct, shall become delinquent if not paid on or before the 30th day following the date on which the order or judgment representing such final determination becomes final and conclusive. Any additional income or franchise tax assessment so contested shall be subject to s. 71.11(23).

The Wisconsin Department of Revenue seeks to impose 18% delinquent interest rather than 6% or 9% simple interest despite the fact that it has canceled the negligence penalty it originally imposed and has conceded that

Wrigley's failure to file was due to good cause, and also despite the fact that the delinquent interest totaled over $75,000 while the negligence penalty it imposed and then canceled was far less.

Delinquent interest is meant to punish – simple interest to recoup. Wrigley should not be punished; it was acting in good faith and on the advice of counsel. Certainly equity is on its side, but on this issue we believe the law also supports them. That law was persuasively stated on pages -55- thru -59- of Wrigley's brief, and we hereafter adopt it as our partial opinion on the matter.

The only statutory authority for imposition of the 18% rate (1.5% per month) is found in section 71.13(1)(a), *Wis. Stat.*, which provides that "[i]ncome and franchise taxes shall become delinquent if not paid when due under s. 71.10(9), and *when delinquent* shall be subject to interest at the rate of 1.5% per month until paid. . . ." (emphasis added). As the language of the statute makes clear, this section imposes the 18% annual rate only on taxes which are delinquent. Section 71.13(2), which follows

immediately after the section quoted, provides a special rule for determining when taxes which are contested become delinquent. This section provides that "[a]ny additional income or franchise tax assessment contested before the tax appeals commission or in the courts, which is finally determined to be correct, shall become delinquent if not paid on or before the 30th day following the date on which the order or judgment representing such final determination becomes final and conclusive."

As is readily apparent from the language of section 71.13(1) and (2), contested taxes such as those here involved do not become delinquent until 30 days after administrative and judicial remedies are exhausted, and until that time, cannot be subject to interest at the delinquency rate.

Moreover, this conclusion is mandated by other provisions of the statutes, as well. Section 71.13(1)(a) establishes a general rule that taxes become "delinquent" if not paid "when due under s. 71.10(9)." Section 71.10(9)(a), in turn, provides that "[c]orporation

franchise and income taxes not paid on or before the 15th day of the 3rd month following the close of the income year, shall become delinquent." In other words, corporate taxes ordinarily become due, and if not paid become delinquent, on the 15th day of the third month after the close of the taxpayer's taxable year. However, section 71.10(9)(d) modifies this general rule by providing that "additional income taxes assessed under s. 71.11(16) and (20) shall become due and payable on entry upon the assessment roll." Sections 71.11(16) and (20) are the sections authorizing the Department of Revenue to audit returns and issue additional assessments such as the assessment at issue in this case. It follows that the taxes at issue in the instant case, which were assessed pursuant to audit will become due only when they are entered upon the assessment roll.

Under sections 71.11(22) and 71.12(1)(a), assessments may not be entered on the assessment roll until the taxpayer has been given notice thereof in writing. Section 71.12(1)(a) provides that any person who receives

such a notice of additional assessment may petition the Department of Revenue for a redetermination thereof, and thereafter may request a hearing before the Tax Appeals Commission. Section 71.12(2) further provides that if such a hearing is requested, the additional tax "shall not be placed on the assessment roll until after hearing and determination of the tax by the tax appeals commission or disposition of the appeal . . ."

Finally, section 71.09(5)(a) provides for a lower 12% rate[1] of interest to be applied to taxes "from the date on which such taxes if originally assessed would have become delinquent if unpaid, to the date on which such taxes when subsequently assessed will become delinquent if unpaid." This section thus clearly contemplates a period of time during which assessed taxes, even though not paid, are not delinquent. The Department of Revenue's apparent interpretation of the statute, to the effect that taxes become delinquent on the day on which the return for the year in question should have been filed, would render this section of the statutes completely meaningless, since there

would then be no period of nondelinquency during which the lower interest rate specified by Section 71.09(5)(a) would apply. It is hornbook law that construction of statutes which render parts of the statute superfluous must be avoided. *Milwaukee Metropolitan Sewerage District v. Wisconsin Dept. of Natural Resources*, 122 Wis. 2d 330, 336, 362 N.W. 2d 158 (Ct. App. 1984).

In short, Wrigley's position that it is not subject to the delinquency penalty in this instance is supported threefold: first, section 71.13(2) specifically and unequivocally modifies the general rule provided in section 71.13(1) by providing that taxes which are contested before the Tax Appeals Commission do not become delinquent until 30 days following its decision. Second, the series of statutory rules provided in section 71.10(9), 71.11(22) and 71.12(2) clearly establishes that the taxes here at issue, which have been assessed pursuant to audit, do not become due and payable until after the taxpayer has exhausted all of his administrative and judicial remedies. Since the taxes have not yet become due, they cannot be delinquent, because

section 71.13(1)(a) makes delinquency dependent upon the taxes first becoming due. Third, section 71.09(5)(a) clearly contemplated a period of time during which subsequently assessed taxes are not delinquent, and accordingly bear a lower rate of interest. Accordingly, the DOR's attempt to impose interest at the delinquency rate is without legal basis and must be rejected as a matter of law.

Submitted by

/s/ Thomas R. Timken
Thomas R. Timken, Commissioner

FOOTNOTE

[1] Section 71.09(5)(a) was amended in 1981 to make a 12% rate applicable to all nondelinquent taxes assessed on or after August 1, 1981, regardless of the year to which the assessment applies. L. 1981, Ch. 20, § 1090n. The assessment here at issue was made prior to the date of amendment. Accordingly, pursuant to the statute in effect as of the date of assessment, the applicable nondelinquent rate is 6% for the years 1973 and 1974 and 9% for the years thereafter.

STATE OF WISCONSIN

TAX APPEALS COMMISSION

WILLIAM WRIGLEY JR. COMPANY		
Petitioner,		DOCKET NO. I-8591
vs.		DISSENTING OPINION
WISCONSIN DEPARTMENT REVENUE OF		
Respondent.		

I dissent from the majority on the issue of reversing the assessment of delinquent interest in favor of simple interest. I am also of the opinion that the issue of burden of proof raised by the petitioner is related to the delinquent interest issue and must be resolved in respondent's favor.

I join in the majority decision on the nexus and late filing issues.

A point which must be emphasized regarding the questions of delinquent interest and burden of proof is that petitioner at no time has filed franchise tax returns for any

of the years under review. Respondent's assessment was thus made under field audit and assessment powers conferred by § 71.11(20)(b) and (c) which provide as follows:

> "(b) For the purpose of ascertaining the correctness of any return *or for the purpose of making a determination of the taxable income of any person*, the department may examine or cause to be examined by any agent or representative designated by it, any books, papers, records or memoranda bearing on the income of the person, and may require the production of the books, papers, records or memoranda, and require the attendance of any person having knowledge in the premises, and may take testimony and require proof material for its information. Upon such information as it may be able to discover, the department shall determine the true amount of income received during the year or years under investigation."
>
> "(c) If it appears upon such investigation that a person has been over or under assessed, *or that no assessment has been made when one should have been made*, the department shall make a *correct assessment in the manner provided in this section*." [Emphasis added].

The underlined portions of the statute clearly authorize respondent to determine and assess taxable income or franchise tax in the absence of a return. An estimated or doomage assessment (see § 71.11(4), Stats.),

while permitted, is not required. *Baker v. Department of Taxation*, 250 Wis. 439, 440-41 (1947).

Petitioner has asserted and the majority has implicitly agreed that the assessment made here by respondent is an "additional assessment."

If petitioner is correct, I would agree that the delinquent interest does not apply under the present facts, by application of § 71.13(1)(a), incorporating § 71.10(9), Stats., and further, that the burden of proof is assigned to the state under § 71.11(21)(cm), at least as it pertains to assessment made for periods exceeding 6 years prior to the assessment. However, I disagree with the contention that an "additional assessment" was made.

Petitioner takes the position that *any* assessment made by the respondent, in contradistinction to the petitioner, is an "additional assessment." Respondent argues that respondent's assessments are not "additional" where, as here, no self-assessment by the taxpayer has ever been made, and respondent's assessment is the "initial" or "original assessment."

Neither party cites authority for its conclusion regarding the meaning of the term "additional assessment."

The term has not been defined in the statute. The term has been considered by the Wisconsin Supreme Court involving the question of when the assessment is complete for purposes of the statute of limitations. See *Weyenberg Shoe Mfg. Co. v. Kelley*, 210 Wis. 638 (1933), and *Cudahy v. Tax Comm.*, 226 Wis. 317 (1937) reflecting the statutory amendments made to legislatively overrule the *Weyenberg Shoe* holding. These opinions are not particularly helpful in defining the term.

Three decisions of the Wisconsin Board of Tax Appeals (this Commission's predecessor) discussed the term "additional assessment." In the first such case, *Superior Water, Light and Power Co. v. Department of Taxation*, 1 WBTA 274, 277 (1941) it was stated as follows:

> "The word 'assessment', as used in the statutes, together with its modifying phrase 'additional,' in our opinion was intended to identify the tax which results from a determination of the taxpayer's liability disclosed through the medium of a field or office audit and becomes existent by virtue of the taxing authority's discovery or ascertainment of

> unauthorized credits or deductions, items of the taxpayer's income not heretofore subjected to the proper tax, and a consideration of the factors essential in computing the correct assessment according to law."

In my opinion, this quote clearly contemplates a self-assessment by the taxpayer by its reference to "unauthorized credits or deductions" as well as "*items* of . . . income *not heretofore subjected* to the proper tax,".

Later Board decisions in *Amber, Inc. v. Department of Taxation*, 2 WBTA 571, 580 (1946) and *Libby, McNeill & Libby v. Department of Taxation*, 2 WBTA 604, 611 (1946) further support this conclusion. Each opinion, after citing the *Superior Water* quote above, cited Law of Federal Income Taxation, *Mertens* for definitions of "additional assessment" under earlier federal revenue acts as meaning "a further assessment for a tax of the same character *previously paid in part*." [Emphasis added] *Amber, Inc., id.*, n.l; *Libby, id.*, n.l. It is noteworthy that in all three cases returns had been filed. I conclude, therefore, that "additional assessment" as considered in these cases contemplated the situation where a return had been filed,

or a previous assessment had been made for the year(s) in question.

This Commission has more recently approved the respondent's imposition of delinquent interest under § 71.13(1)(a), Stats., where an income tax return for the period in question was not timely filed. See *Olken v. Department of Revenue*, WTAC Docket No. I-8203, CCH Wis. Tax Rep. ¶202-057 (1982), where application of the delinquent rate was sustained for 1972-1978. Returns were filed by the petitioner, but not until the prehearing conference before this Commission. See also *Gottschalk v. Department of Revenue*, WTAC Docket No. I-7642, CCH Wis. Tax Rep. ¶201-922 (1981), where no return was filed until nine days before the issuance of the appellate bureau's notice of action.

Each of these cases involved filing of returns after the income tax assessment and delinquent interest thereon were imposed. Thus, they are not materially different from the complete non-filing situation present here.

Based on my reading of the above discussed Board cases, I must conclude that the term "additional assessment" assumes the filing of a return and self-assessment or some other previous assessment.

Our two more recent decisions in *Olken* and *Gottschalk* are ample authority and precedent for the respondent's application of delinquent interest under § 71.13(1)(a) to an assessment made in the absence of a properly filed return or payment of the tax due.

Since § 71.11(20)(c) authorizes a "correct assessment" and does not use the term "additional," I must conclude that the "correct assessment" contemplated may be either an "original" assessment, as here in the case of no prior assessment, or an "additional" assessment as used in reference to the auditing of returns or additional to some other assessment of the same type of tax for the same year.

There are also, beyond the clear meaning of the word "additional," several other very important reasons why I do not consider the assessment here as an "additional" assessment. They have to do with "symmetry" in the

statutes. First, the construction proffered by petitioner would favor non-filers over *late* filers because § 71.10(9)(c) clearly provides that "Taxes due on returns filed after the date on which returns are required to be filed shall be deemed delinquent." Delinquent taxes are subject to delinquent interest under § 71.13(1)(a). I find any construction favoring non-filing as anomalous, if not totally absurd. Secondly, delinquent interest applies to *sales* tax unpaid by the due date of the return in the case of no return filed or a return filed late, by a more clearly expressed statute. See § 77.60(2)(b), Stats. There is no reason which comes to mind why the legislature would sanction delinquent interest on sales tax non-filers but not on franchise/income tax non-filers.

I further disagree with the conclusion of the majority in relation to the reference in § 71.13(1)(a) to § 71.10(9) that § 71.10(9)(a) is limited by § 71.10(9)(d). Subs. (9)(a) deals specifically with the subject matter of delinquency of corporation franchise and income taxes not paid on or before the 15th day of the 3rd month following the close of

the income year. Subs. (9)(d) refers more generally to when back assessments of *omitted* income taxes and additional income taxes assessed become "due and payable." While the cross-reference in § 71.13(1)(a) that taxes become delinquent if not paid "when due" under § 71.10(9) generally determines the date of delinquency, this cannot reasonably be read to control over the delinquency date established with respect to unpaid corporation franchise or income taxes as set forth in § 71.10(9)(a). When read together, §§ 71.10(9)(a) and (d) mean that corporation income or franchise taxes not paid when originally due whether self-assessed on the return or no return is filed where one was due become delinquent thereafter. Additional assessments made by respondent are due and payable upon entry on the assessment roll, i.e., when they have become final and conclusive. In other words, corporate franchise taxes are originally due under § 71.10(9) on or before the 15th day of the 3rd month following close of the income year. Thus, although the petitioner has the right to contest the amount of taxes

assessed by respondent absent a filed return, the taxes as finally determined are deemed delinquent as of the due date of the return. This is the equivalent of a self-assessment by a return filed without payment of the taxes due. This is the interpretation which has been followed administratively by respondent in this and other cases.

Petitioner has not shown me any sufficient reason to depart from precedent of this Commission construing § 71.13(1)(a) to require delinquent interest as of the would-be due date of the return where one is not filed, or to inject absurdity or asymmetry vis-a-vis other income/franchise and sales tax provisions.

My conclusion in this regard carries over to the issue of burden of proof. Both parties agree that under ordinary circumstances the burden of proof to show the assessment was incorrect is upon the taxpayer. However, petitioner correctly points out that under § 71.11(21)(cm), Stats., the burden shifts to the respondent to prove by a preponderance of the evidence "if additional assessments

are made for any period more than 6 years before the year in which the assessment is made." I again agree with respondent, however, that the burden of proof shifts only if "*additional* assessments" are made, which was not the case here. Subsection (c) of § 71.21 allows for assessment for any year since January 1, 1911 of income of any year if either the person has (1) made an incorrect income or franchise tax return with intent to defeat or evade the income or franchise tax law, or (2) failed to file any income tax or franchise tax return for any of such years. In only the first situation would the respondent's assessment have been "additional" under my view.

Section 71.11(20)(c) refers to a "correct assessment in the manner provided in this *section*," i.e., § 71.11, Stats., if "no assessment has been made where one has been made." The assessment time limitations under § 71.11(21) are not limited to additional assessments because subs. 71.11(20)(c) permits "correct assessment" where no assessment has been made, in the manner provided in § 71.11. However, § 71.11(21)(cm) is *limited* to additional

assessments, not to original assessments under § 71.11(20)(c).

For these reasons I believe that the burden of proof remained with petitioner.

I therefore dissent from the Commission's decision to the extent it reverses the assessment of delinquent interest.

Submitted by:

/s/ Robert C. Junceau
Robert C. Juneau, Commissioner

WISCONSIN TAX APPEALS COMMISSION

NOTICE OF APPEAL INFORMATION

NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED FOR EACH AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS RESPONDENT

The following notice is served on you as part of the Commission's decision rendered:

Any party has a right to petition for a rehearing of this decision within 20 days of the service of this decision, as provided in section 227.12 of the Wisconsin Statutes, a copy of which is printed on the reverse side hereto. The 20 day period commences the day after personal service or mailing of this decision. (Decisions of the Tax Appeals Commission are mailed the day they are dated. In the case of an oral decision, personal service is the oral pronouncement of the decision at the hearing.) The petition for rehearing should be filed with the Wisconsin Tax Appeals Commission. Nevertheless, an appeal can be taken directly to circuit court through a petition for judicial review. It is not necessary to petition for a rehearing.

Any party has a right to petition for a judicial review of this decision as provided in section 227.16 of the Wisconsin Statutes, a copy of which is printed on the reverse side hereto. The petition should be filed in circuit court and served upon the Wisconsin Tax Appeals Commission within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing. The 30 day period commences the day after personal service or mailing of the

decision or order, or the day after the final disposition by operation of law of any petition for rehearing. (Decisions of the Tax Appeals Commission are mailed the day they are dated. In the case of an oral decision, personal service is the oral pronouncement of the decision at the hearing.) The petition for judicial review should name the Department of Revenue as respondent and must be served upon that department within 30 days of filing the petition for judicial review in circuit court.

This notice is part of the decision and incorporated therein.

Note: Section 227.12 and 227.16 Wis. Stats. see reverse side.

The statute sections shown in this material have been generated from the original data base of the 1981-92 Wisconsin Statutes, but may not be an exact duplication. Please refer to the 1981-82 Wisconsin Statutes for the official text.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be a prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

(2) The filing of a petition for rehearing shall not suspend or delay the effective date of the order, and the order shall take effect on the date fixed by the agency and shall continue in effect unless the petition is granted or until the order is superseded, modified, or set aside as provided by law.

(3) Rehearing will be granted only on the basis of:

(a) Some material error of law.

(b) Some material error of fact.

(c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.

(4) Copies of petitions for rehearing shall be served on all parties of record. Parties may file replies to the petition.

(5) The agency may order a rehearing or enter an order with reference to the petition without a hearing, and shall dispose of the petition within 30 days after it is filed. If the agency does not enter an order disposing of the

petition within the 30-day period, the petition shall be deemed to have been denied as of the expiration of the 30-day period.

(6) Upon granting a rehearing, the agency shall set the matter for further proceedings as soon as practicable. Proceedings upon rehearing shall conform as nearly may be to the proceedings in an original hearing except as the agency may otherwise direct. If in the agency's judgment, after such rehearing it appears that the original decision, order or determination is in any respect unlawful or unreasonable, the agency may reverse, change, modify or suspend the same accordingly. Any decision, order or determination made after such rehearing reversing, changing, modifying or suspending the original determination shall have the same force and effect as an original decision, order or determination.

History: 1975 c. 94 s. 3; 1975 c. 414; 1977 c. 139; 1979 c. 208.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for

rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified. The petition may be amended, by leave of court, though the time for serving the same has expired. The petition shall be entitled in the name of the person serving it as petitioner and the name of the agency whose decision is sought to be reviewed as respondent, except that in petitions for review of decisions of the following agencies, the latter agency specified shall be the named respondent:

1. The tax appeals commission, the department of revenue.

2. The banking review board or the consumer credit review board, the commissioner of banking.

3. The credit union review board, the commissioner of credit unions.

4. The savings and loan review board, the commissioner of savings and loan, except if the petitioner is the commissioner of savings and loan, the prevailing parties before the savings and loan review board shall be the named respondents.

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

(d) The agency (except in the case of the tax appeals commission and the banking review board, the consumer credit review board, the credit union review board, and the savings and loan review hoard) and all parties to the proceeding before it, shall have the right to participate in the proceedings for review. The court may permit other interested persons to intervene. Any person petitioning the court to intervene shall serve a copy of the petition on each party who appeared before the agency and any additional parties to the judicial review at least 5 days prior to the date set for hearing on the petition.

(2) Every person served with the petition for review as provided in this section and who desires to participate in the proceedings for review thereby instituted shall serve upon the petitioner, within 20 days after service of the petition upon such person, a notice of appearance clearly stating the person's position with reference to each material allegation in the petition and to the affirmance, vacation or modification of the order or decision under review. Such notice. other than by the named respondent, shall also be served on the named respondent and the attorney general, and shall be filed, together with proof of

required service thereof, with the clerk of the reviewing court within 10 days after such service. Service of all subsequent papers or notices in such proceeding need be made only upon the petitioner and such other persons as have served and filed the notice as provided in this subsection or have been permitted to intervene in said proceeding, as parties thereto, by order of the reviewing court.

History: 1971 c. 243; 1975 c. 94 s. 3; 1975 c. 414; 1977 c. 26 s. 75; 1977 c. 187; 1979 c. 90, 208, 355.

The circuit court has no jurisdiction of an appeal from the tax appeals commission where the petition for review was served only on the department of revenue and not on the commission within the allowed 30 days. Brachtl v. Dept. of Revenue, 48 W (2d) 184, 179 NW (2d) 921.